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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-412

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

J. H. ADAMS, *et al.*, RIVERVIEW GAS COMPRESSION COMPANY, *et al.*, and FIRST NATIONAL BANK OF BORGER, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review three opinions and judgments of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 22, 1975.

OPINIONS BELOW

I. *Phillips Petroleum Company* v. *J. H. Adams, et al.*, No. 74-1777. Judgment of the District Court was accompanied by an unpublished memorandum opinion dated February 7, 1974, which appears in the Appendix hereto. (App. 28a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d 355. (App. 45a).

II. *Phillips Petroleum Company* v. *Riverview Gas Compression Company, et al.*, No. 74-2009. The opinion of the District Court is reported at 372 F. Supp. 282. (App. 106a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d at 513 F.2d 374. (App. 130a).

III. *First National Bank of Borger* v. *Phillips Petroleum Company,* No. 74-2330. The judgment of the District Court was accompanied by an unpublished memorandum opinion dated February 27, 1974, which appears in the Appendix hereto. (App. 86a). The opinion of the Court of Appeals for the Fifth Circuit is reported at 513 F.2d 371. (App. 97a).

JURISDICTION

The three judgments of the Court of Appeals for the Fifth Circuit were made and entered on May 22, 1975. Three separate timely petitions for rehearing *en banc* were denied on June 18, 1975 (App. 85a, 105a, 136a), and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals for the Fifth Circuit in a diversity action may award interest to natural gas producers pursuant to percentage of proceeds contracts on monies collected by the Petitioner during the pendency of rate increase proceedings before the Federal Power Commission when such sums were not due and payable to the gas producers until the rate increase was approved and when Texas statutes and state court decisions prohibit an award of interest for the period prior to the time money is due and payable.

STATUTES AND REGULATIONS INVOLVED

The statutory and regulatory provisions involved are set forth in the Appendix beginning at page 1a. They include the following:

1. Texas Revised Civil Statutes Annotated, arts. 5069-1.01 and 5069-1.03.
2. Rules of Decision Act, 28 U.S.C. § 1652.
3. Natural Gas Act, 15 U.S.C. §§ 717-717w.
4. 18 C.F.R. § 154.102.

STATEMENT OF THE CASE

Phillips Petroleum Company ("Phillips") is a major petrochemical company which is engaged, among other things, in the purchase, transportation, and sale of natural and casinghead gas. During the time relevant to this action, Respondents were all engaged in the production and sale of oil and gas from mineral leases in the Texas Panhandle. Casinghead gas produced by Respondents was sold to Phillips pursuant to precentage-of-proceeds contracts which provided that the amount payable under the contract would be pegged as a percentage of the price at which Phillips sold gas to third parties.

The price of gas charged by Phillips in its sales to pipeline companies for interstate transportation and resale was controlled by the Federal Power Commission ("FPC" or "Commission") under its broad authority to fix just and reasonable rates for such sales. The Natural Gas Act allows a company such as Phillips to increase its rates without prior FPC approval, but the Commission may impose a five-month suspension period and require the refund to purchasers of all or

part of the increase if it ultimately finds the higher rate was unjustified. 15 U.S.C. § 717c(e); 18 C.F.R. § 154. 102. By statute the FPC may order payment of interest on the monies refunded to the pipeline companies. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.102(c).

Phillips filed numerous proposed price increases with the FPC that were originally suspended by the Commission and later put into effect by Phillips subject to refund. Phillips was required to file a corporate undertaking with the FPC to make certain that such refunds would be made to purchasers if the FPC so ordered. Phillips made monthly payments to Respondents for its gas purchases on the basis of the "firm proceeds" of Phillips' own sales (i.e., calculated on the rates which FPC had previously approved) and did not remit any of the monies attributable to the proposed rate increases while FPC approval of the rates was still pending. This practice assured the availability of sufficient funds to pay any refunds to purchasers ordered by the FPC. If the higher rates were not approved by the FPC, Phillips would have an obligation to refund all or part of the funds to purchasers, and neither Phillips nor Respondents would have any legal claim to the money. If, on the other hand, there were an FPC approval of the increases, Phillips would become legally obligated to account for a portion of the excess funds to Respondents. Prior to final FPC action, Phillips was thus in the nature of a stakeholder among interested parties.

The FPC consolidated for hearing Phillips' pending rate increase applications and those of other companies under the consolidated designation Docket No. AR 64-1, *et al.*, known as the Hugoton-Anadarko Rate Cases.

On September 18, 1970, the FPC issued Opinion 586 which approved a portion of the price increases requested by Phillips and established refund requirements for those increases that were not approved. 44 F.P.C. 761 (1970). The State of California challenged the legality of the FPC Opinion, but on July 31, 1972, the Ninth Circuit Court of Appeals affirmed the FPC's decision. *People of the State of California, et al.* v. *Federal Power Commission,* 466 F.2d 974 (9th Cir. 1972). No petition for writ of certiorari was filed by any party during the 90-day period following the court's decision and on October 28, 1972, FPC Opinion 586 became final.

After the FPC Opinion become final, Phillips divided the excess funds it was holding subject to refund into two categories: (i) "refundable monies" which were based on rate increases disallowed by the FPC and which Phillips was obligated to return to purchasers with interest, and (ii) "sustainable monies" which Phillips was entitled to retain except that there now existed under the percentage-of-proceeds contracts an obligation by Phillips to account for a portion of the sustainable monies to the Respondents. Phillips therefore recomputed the weighted average price on each month's gas sales in the Texas Panhandle field to determine the difference between the firm proceeds which had been disbursed on a month-by-month basis and the amount to which the supplier of natural gas was now entitled as a result of the price increases just approved.

During the period the gas had been produced and sold to Phillips, the mineral leases were held by persons who, before FPC Opinion 586 was issued, as-

signed their leasehold interests to other parties. When FPC Opinion 586 became final, and Phillips' obligation to account for the additional funds matured, both the former owners and the present holders of the leases asserted conflicting claims to the funds which Phillips was prepared to pay. Phillips brought a diversity interpleader action in District Court to ascertain which claimant was entitled to receive the additional proceeds. Each of the Respondents not only asserted claims to the additional funds but also filed counterclaims against Phillips seeking interest on the money that had been held by the Company prior to the time the FPC action approving the rate increases became final.

Upon trial of these cases the District Court determined the ownership of the principal sum, but rejected the claims for interest. In disallowing the interest claims, the District Court stated that the claimants had no enforceable right to receive any of the money collected by Phillips subject to refund until the FPC approved the rate increases. Inasmuch as the money did not become due and payable until October 28, 1972, when the time for final challenge to FPC Opinion 586 had expired, the District Court held that the Company was not liable under Texas law for interest prior to that time. Further, from October 28, 1972, until December 21, 1973, when Phillips paid the money into the registry of the Court, there existed a bona fide dispute among the claimants to the money and Phillips was therefore not liable for interest during that time. The District Court noted that none of claimants had demanded that the money be paid into the registry of the Court following the final effective date of the FPC Opinion.

The District Court's ruling on the matter of interest was appealed to the United States Court of Appeals for the Fifth Circuit which reversed the District Court on this issue. The Court of Appeals held that notwithstanding the fact that the principal sum did not become due and payable until the FPC's Order became final, Phillips should nevertheless pay interest for the money collected prior to that time on equitable grounds.

REASONS FOR GRANTING THE WRIT

The Texas statutes and controlling judicial precedents of the State permit interest to be awarded only *after* the date that the principal sum of money owed becomes *due and payable*. These legal requirements, under the Rules of Decision Act, 28 U.S.C. § 1652 and the law of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), control the disposition of the instant diversity cases. The District Court faithfully followed this State law and denied Respondents the right to insist on interest during the period the FPC was deciding whether, and to what extent, the increase in rates would be approved. The Fifth Circuit Court of Appeals, in overruling the District Court, did not follow the interpretative criteria used by the Texas courts in determining when interest is to be paid; instead the Fifth Circuit superimposed on the clear statutory directive its own "equity" test. The decisions of the Court of Appeals are in direct conflict with the Texas statutory law and decisions of the Texas state courts. In addition, these decisions are in conflict with a prior decision of the Fifth Circuit which interpreted the Texas interest statute, but which was not cited in the Court of Appeals' opinions.

While these cases themselves involve large amounts of money, their outcome has an importance far greater

than the financial self-interests of the particular litigants. Failure to follow the state courts' interpretation of Texas law will subject Phillips and numerous other companies in the industry to thousands of claims aggregating many millions of dollars. In the Panhandle field of Texas alone, Phillips had 966 outstanding percentage-of-proceeds gas purchasing contracts with more than $9.7 million in additional proceeds attributable to these contracts.[1] The same legal issue in controversy here has already been raised in numerous pending cases; and the large financial stakes at risk make certain that hundreds of additional cases will be filed.[2]

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[1] *Phillips Petroleum Company* v. *J. H. Adams,* 513 F.2d at 357.

[2] A demand against Phillips for interest has been made in the following cases pending in federal or state courts: *Phillips Petroleum Company* v. *Grady Hazelwood, et al.,* No. CA-2-1398, U.S.D.C., N.D. Tex., Amarillo Div.; *Bolton, et al.* v. *Phillips Petroleum Company* v. *Glass,* No. CA-2-1478, U.S.D.C., N.D. Tex., Amarillo Div.; *Van Norman Oil Company* v. *Phillips Petroleum Company* v. *Van Norman Oil Company and American Petrofina Company of Texas,* No. CA-2-1492, U.S.D.C., N.D. Tex., Amarillo Div.; *R. P. Fuller, et al.* v. *Phillips Petroleum Company,* No. CA-5-74-140, U.S.D.C., N.D. Tex., Lubbock Div.; *Dunn, et al.* v. *Phillips Petroleum Company* v. *Barker,* No. CA-2-75-46, U.S.D.C., N.D., Tex., Amarillo Div.; *Lubell Oil Co.* v. *Phillips Petroleum Company, et al.,* No. C73-86, in the District Court in and for Tulsa County, Oklahoma; *Mitchell, et al.* v. *Phillips Petroleum Company* v. *Service Drilling Co.,* No. 53830A, in the 47th District Court in and for Potter County, Texas; *Shutts, et al.* v. *Phillips Petroleum Company,* No. 5309, in the District Court of Kiowa County, Kansas (a class action). In addition, various other class actions have been filed against other companies in District Court in the State of Kansas in which the issue of interest is being litigated: *Gray, et al.* v. *Amoco Production Company,* No. 3125, in the District Court of Grant County, Kansas; *Helmley, et al.* v. *Cities Service Oil Company,* No. 10,998, in the District Court of Stafford County, Kansas; *Maddox, et al.* v. *Gulf Oil Corporation,* No. 11,230 in the District Court of Seward County, Kansas; *Nix, et al.* v. *Northern Natural Gas Producing Company, et al.,* No. 3116, in the District Court of Grant County, Kansas; *Sterling, et al.* v. *Marathon Oil Company,* No. 10,764, in the District Court of Rice County, Kansas; *Sterling, et al.* v. *Superior Oil Company,* No. 2715, in the District Court of Stanton County, Kansas; *Coffey* v. *Atlantic Richfield Co.,* No. 3115, in the District Court of Grant County, Kansas; *Helmley* v. *Ashland Oil Company,* No. 125,388, in the District Court of Shawnee County, Kansas.

The instant three cases relate to FPC Opinion 586 governing rates in the Hugoton-Anadarko area. FPC Opinion 662 also has been issued regarding rates in the Permian Basin area of Texas and it is estimated that $7,500,000 in additional proceeds is attributable to natural gas transactions by Phillips in that area. Further, Phillips presently is collecting money subject to refund under the provisions of FPC Opinion 699, as amended (Docket R-389-B, Nationwide New Gas Rate) and collects approximately $500,000 per month at current rates.

A Supreme Court determination is needed to put this legal question to rest and avoid a multiplicity of burdensome, expensive and needless lawsuits. Since the issue in dispute has widespread and continuing importance, not only to an essential segment of American industry, but also to the orderly administration of justice, these cases merit the attention of the Supreme Court.

I. The Decisions of the Fifth Circuit Are in Conflict with the Applicable Texas Statutes and State Court Decisions.

A. Texas Statutory and Case Law Do Not Allow an Award of Interest for the Period Prior to the Time the Interpleaded Funds in These Three Cases Became Legally Due and Payable.

Under Texas state court decisions, it was not legally proper for the Court of Appeals to disregard the explicit statutory criteria and hold, on broad equity grounds, that Phillips was legally obligated to pay interest on the money for the entire period the legal status of the proposed rate increases was being adjudi-

cated by the FPC. Admittedly, no amount was due and payable to anyone until after the FPC Opinion became final and under the Texas statute this was the controlling factor.

Interest is defined under the Texas statute as "the compensation allowed by law for the use or forebearance or detention of money . . . ." Tex. Rev. Civ. Stat. Ann. art. 5069-1.01. The Texas statute further provides that:

> "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable. . . ." (Tex. Rev. Civ. Stat. Ann. art. 5069-1.03.)

The parties have stipulated and admitted that the interpleaded funds did not become legally available for distribution until October 28, 1972, the date on which FPC Opinion 586 approving certain rate increases and disapproving others became immune from further legal attack. From that date until December 21, 1973, when Phillips paid the disputed funds into court, the Company was a stakeholder faced with the conflicting claims to the monies being held.

The Court of Appeals acknowledged that no award of interest should be made "except in such cases as come within the terms of the enabling legislation. *Watkins* v. *Junker,* 1897, 90 Tex. 584, 40 S.W. 11; *Kirkpatrick* v. *Great American Ins. Co.,* Tex. Civ. App. 1927, 299 S.W. 943, no writ." 513 F.2d at 365. The Court of Appeals held in this regard that the claimants could seek interest from Phillips only as "compensation allowed by law for the use . . . of money," and that

the principal sum owed here was "neither ascertainable nor due and payable until after the FPC Order became final. . . ."[3] 513 F.2d at 365.

The Texas courts have consistently held that interest not be awarded for the period prior to when the debt became due and payable. As far back as 1932 in *Watson Co.* v. *Shaw,* 47 S.W. 2d 474 (Tex. Civ. App., Dallas, 1932), *rev'd on other grounds, sub nom. American Surety Co.* v. *Shaw,* 69 S.W. 2d 47 (Tex. Comm. App. 1934) the Texas Court of Civil Appeals explained the rule by means of a short question:

> "But when did the principal sums become due and payable? For it is from this date that interest should be calculated." (47 S.W. 2d at 481.)

In *G&W Marine, Inc.* v. *Morris,* 471 S.W. 2d 644 (Tex. Civ. App., Beaumont, 1971, writ ref'd n.r.e.), an employee had brought an action against a corporate employer to recover amounts claimed to be due under an employment contract. The court awarded the employee additional compensation but held that under Tex. Rev. Civ. Stat. Ann. art. 5069-1.03, the statute involved here, interest could only be awarded *"from the date the sum became due and payable. . . ."* 471 S.W. 2d at 649 (Emphasis added).

In a somewhat analogous situation to the instant cases, the Attorney General of the State of Texas issued an opinion regarding the potential liability of pipeline companies for interest under the Texas inter-

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[3] The Court of Appeals also noted that "Phillips has done the Adams family no wrong, so that the Adamses cannot claim interest as an item of damages, nor does this case fall within the statutory rubric of 'forebearance or detention' of money." 513 F.2d at 365.

est statute for nonpayment of royalties to the State. The Attorney General indicated that no interest can legally be awarded when the principal sum to be ascertained depends on action of a third party which has not occurred. Interest only accrues in that case after the amount has been ascertained and has become due and payable. Op. Att'y Gen. Tex. V-791 (1949).

The Fifth Circuit acknowledged that the Texas courts have been "strict in refusing interest for periods prior to the time when an obligation becomes due and payable" but concluded that interest could be awarded for a period prior to the due date of the debt for equitable reasons. 513 F.2d at 365-366. The only authority cited in support of this view is one case which did not even involve the Texas interest statute at issue here. *Treon* v. *Richter,* 265 S.W. 2d 125 (Tex. Civ. App., San Antonio, 1954, writ ref'd n.r.e.). *Treon* is an interest as damages case [4] and dealt with an interpretation of the provisions of the Agricultural Protective Act, Tex. Rev. Civ. Stat. Ann. art. 1287-1, *et seq.* The Court held only that under that statute where the buyer defaulted on a crop purchase payment, interest would start to accrue from the date the crop was delivered, even though a separate section of the statute permitted a 30-day payment delay. Tex. Rev. Civ. Stat. Ann. art. 1287-3, § 11. The Fifth Circuit stated that this decision

[4] The four cases cited in *Treon* all dealt with interest awarded as damages. *Routon* v. *Phillips,* 246 S.W. 2d 223, 227 (Tex. Civ. App., Fort Worth, 1952, writ ref'd n.r.e.); *Settegast* v. *Timmins,* 6 S.W. 2d 425, 429-430 (Tex. Civ. App., Beaumont, 1928, writ ref'd n.r.e.); *Ewing* v. *Wm. L. Foley, Inc.,* 115 Tex 222, 280 S.W. 499, 503-504 (1926); and *Watkins* v. *Junker,* 90 Tex. 584, 40 S.W. 11, 12 (1897). Here, as the Court of Appeals itself noted, we are not concerned with interest as damages. 513 F.2d at 365.

was "apparently for equitable reasons." 513 F.2d at 366.

The controlling provision of the Texas interest statute states clearly that interest shall not be awarded until an obligation is "due and payable." Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. The Court of Appeals cites no Texas state court decision where interest on the principal sum was awarded pursuant to this statute for a period prior to the time the obligation became due and payable.[5] The Court of Appeals does cite a number of cases where the Texas courts had to ascertain as a factual matter the amount actually owed on the date the legal obligation to pay matured. In those cases the sums due were found in fact also to be ascertainable and the decisions are therefore consistent with the literal requirements of the statute. By contrast the decisions in our cases cannot be reconciled with the statutory language because until the FPC decision became final, not only was the *amount* to be paid not ascertainable, but there was no legal obligation to pay anything at all—and there might never be such an

[5] The Texas courts have explained that in construing State statutes, the ordinary meaning of words shall be used:

> "Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. *But they must find its intent in its language, and not elsewhere. They are not the law-making body.* They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain." *Texas Highway Commission* v. *El Paso Bldg. & Const. Trades Council,* 149 Tex. 457, 234 S.W. 2d 857 (1950) (Emphasis added).

obligation.[6] Thus, there was no due and payable date within the meaning of the statute.

B. Interest on the Interpleaded Funds Is Barred Under Texas Law for the Period Following the Effective Date of the FPC Order.

The Fifth Circuit held that interest to Respondents should be awarded not only for the period prior to when the FPC Order became final, but also from that date until December 21, 1973, when the Company tendered the interpleaded funds into the Registry of the District Court. The District Court refused to award interest for this period, holding that since there was "a bona fide dispute among the claimants to the money, Phillips Petroleum Company was not obligated in any respect for the payment of interest on said money up until December 21, 1973" when the money was deposited with the Clerk of the Court. In so ruling, the District Court correctly applied the law in Texas that a stakeholder who is uncertain to whom to pay a fund because of conflicting claims is not liable for interest for use of the funds during the period of uncertainty. For this ruling the District Court relied on *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.*, 365 S.W.2d 692 at 696 (Tex. Civ. App., Houston, 1963, writ ref'd n.r.e.), among other cases. *See also,* Op. Att'y Gen. Tex. V-791 (1949).

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[6] We note the well-established rule prohibiting an award of interest in bankruptcy cases. As stated by the Supreme Court in *Thomas* v. *Western Car Co.*, 149 U.S. 95, 116-117 (1893), and followed thereafter in a long line of cases:

> "after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, *interest is not allowed on the claims against the funds. The delay in distribution is the act of the law;* it is a necessary incident to the settlement of the estate." (Emphasis added)

The Fifth Circuit Court of Appeals ignored the applicable law of Texas as expressed by the courts of the State and instead based its ruling in this regard on its reading of cases in other jurisdictions. In so doing the Court stated:

> "We do not believe that the Texas law in this area is different from that in other jurisdictions, *but see Allied Building Credits, Inc.* v. *Grogan Builders Supply Co. . . .*" (513 F.2d at 369.)

While Phillips neither disputes nor concedes that the Court's interpretation of the law of other jurisdictions is correct, we submit that the only relevant law is that of the State of Texas and Texas law provides that a bona fide dispute over the title to funds bars any award of interest.

In *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.*, 365 S.W.2d 692 (Tex. Civ. App., Houston, 1963, writ ref'd n.r.e.), the Texas appellate court held that an award of interest for a time prior to the release of a federal tax lien was improper. The court thus stated:

> "Grogan was not entitled to any payment from the reserve account until that date. Prior to that date Grogan had become subject to a federal tax lien, so that Allied, which was served with such lien, could not make payment to Grogan with impunity until such tax lien was released. We are of the opinion that the trial court erred in allowing interest as was done, and that the amount of $4,532.00 should bear interest from October 18, 1960, when such lien was released. . . ." (365 S.W. 2d at 696.)

Similarly, in *Gulf Pipe Line Co.* v. *Nearen, et al.*, 138 S.W.2d 1065 (Tex. Comm. App. 1940), the Court held

that the purchase price of oil did not become due and payable until a dispute as to ownership was resolved and the amount due would not commence to draw interest until adverse claims to the funds were settled.

The Fifth Circuit's decision to overturn the District Court interpretation of State law on the issue of interest constituted an abrupt departure from settled principles of appellate review. In a diversity action the determination by a district court as to questions of the local law of the state where it sits is to be accorded great weight by the Court of Appeals, which will not adopt a contrary view unless clearly convinced of error. In this regard in another case involving the interpretation of Texas law, the Fifth Circuit stated:

> "It is not our function to expand the law of Texas. Rather, we must apply the interpretation which most likely would be applied by the Texas court of last resort. In this effort, due to his experience and familiarity with Texas law, precedent directs us to extend great deference to the Trial Judge's understanding of it. . . . " (*Devers* v. *Mobil Chemical Corp.*, 488 F.2d 258, 260 (5th Cir. 1973), *cert. denied,* 417 U.S. 947 (1974).)

The Court of Appeals in the instant cases has improperly refused to follow the clear mandate of Texas decisional law which, as the District Court determined, bars any award of interest.

II. The Decisions in the Instant Cases Are in Conflict with a Prior Decision of the Fifth Circuit.

The Fifth Circuit has not only refused to follow the applicable law of the State of Texas regarding the award of interest, but in addition, has ignored a prior decision in which the Court of Appeals had occasion

to construe the Texas interest statute. The facts of the earlier Fifth Circuit case, *City of Texarkana, Texas* v. *Arkansas Louisiana Gas Company,* 118 F.2d 289 (5th Cir. 1941), *vacated per stipulation,* 315 U.S. 780 (1942), bear a striking similarity to the facts presented here, although this contrary decision was not even cited in the Court of Appeals' opinions. In the *Texarkana* case the Appellee served as a public utility for the distribution of gas in both the City of Texarkana, Texas and the City of Texarkana, Arkansas. The Gas Company was required under the terms of its Texas franchise to charge no higher rates in Texas than it collected in Arkansas. The Gas Company had been compelled in litigation to establish lower rates in Arkansas and an action was brought to order the Gas Company to maintain in Texas these lower gas rates and to refund to Texas consumers any amounts that had been overcharged plus interest.

Upon trial of the case the District Court held that refunds to Texas consumers were due but that no interest would be allowed. The sole issue on appeal to the Fifth Circuit related to the disallowance of interest claims by the District Court. Since the case was a diversity action, the Fifth Circuit reviewed Texas law to determine whether interest should have been awarded the Texas consumers and held that interest was not required by statute, nor could it be awarded as damages for the detention of money. The Court thus stated:

> "The amount of each refund due in this case depended on simple fixed factors, to-wit, the rate charged and the rate finally established in Arkansas . . . . [T]he refund in this case was not due to be made as soon as the money was collected, for

> under the contract an involuntary lower rate was not to be put into effect in Texas until it was finally established in Arkansas. [citations omitted] Until then the Gas Company could collect and keep the money under the current Texas rate." (118 F.2d at 294-295.)

The Fifth Circuit explained that interest was not owing under the Texas interest statute since "the rates collected were collected under a bona fide claim of right . . . " and the refunds were not due and payable until the rates established in Arkansas became final. 118 F.2d at 291. Similarly, no interest can properly be awarded under Texas law in the instant cases until FPC Opinion 586 became final since Phillips had no duty to pay any sums to Respondents until that time. Indeed, the factual context here requiring the denial of interest is even more compelling than in the Texarkana case since no money was ever collected from claimants, held for a period, and subsequently refunded as in *Texarkana,* but rather the money was collected by Phillips from *third parties* and ultimately paid to Respondents when the amounts became due and payable.

The decisions of the Fifth Circuit in the instant cases are thus in direct conflict with the decision of the same Court of Appeals in the *Texarkana* case. Under Texas law the Fifth Circuit determined in *Texarkana* that interest could not be awarded for a period during which sums were collected from consumers under a bona fide claim of right, but would only accrue from the date that the sum were to be refunded, the due and payable date. In the instant cases the Fifth Circuit construed the virtually identical interest statute and held that interest should be paid prior to the due date for equitable reasons despite an explicit statutory pro-

hibition. Under these circumstances, this intracircuit conflict on a question of local law that is of great and recurring importance to the natural gas industry requires the exercise of the Supreme Court's power of supervision. *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456 (1967); *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 508 (1950). As this Court stated in *John Hancock Ins. Co.* v. *Bartels,* 308 U.S. 180, 181 (1930):

> "Because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited, and because of the importance of the question, we granted certiorari. . . ."

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Texas Revised Civil Statutes Annotated, Articles 5069-1.01 and 5069-1.03 provides:

Article 5069-1.01. Definitions

(a) "Interest" is the compensation allowed by law for the use or forbearance or detention of money; provided however, this term shall not include any time price differential however denominated arising out of a credit sale.

(b) "Legal Interest" is that interest which is allowed by law when the parties to a contract have not agreed on any particular rate of interest.

(c) "Conventional Interest" is that interest which is agreed upon and fixed by the parties to a written contract.

(d) "Usury" is interest in excess of the amount allowed by law.

(e) "Person" means an individual, partnership, corporation, joint venture, trust, association or any legal entity, however organized.

Article 5069-1.03. Legal rate applicable

When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made.

Rules of Decision Act, 28 U.S.C. § 1652 provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Natural Gas Act, 15 U.S.C. §§ 717-717w provides:

§ 717. Necessity for regulation of natural gas companies.

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

§ 717a. Definitions.

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any Point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

§ 717b. Exportation or importation of natural gas.

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from

a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

§ 717c. Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, prac-

tices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect. the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made

at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearings and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 717d. Fixing rates and charges; determination of cost of production or transportation.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless

such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

§ 717e. Ascertainment of cost of property.

(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings.

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to com-

munities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No nautral-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a nautral-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending

the determination of any such aplication, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Comission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted there-

under such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

§ 717g. Accounts; records; memoranda.

(a) Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memo-

randa, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however,* That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with

or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

§ 717h. Rates of depreciation.

(a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of nautral gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such nautral-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each commission to pre-

sent its views and shall receive and consider such views and recommendations.

§ 717i. Periodic and special reports.

(a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) It shall be unlawful for any natural-gas company willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

§ 717j. State compacts; reports on.

(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, to-

gether with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission.

§ 717k. Officials dealing in securities.

It shall be unlawful for any officer or director of any natural-gas company to receive for his own benefit, directly or indirectly, any money or thing of value in respect to the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued, by such natural-gas company, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends, other than liquidating dividends, of such natural-gas company from any funds properly included in capital account.

§ 717l. Complaints.

Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this chapter may apply to the Commission

by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

§ 717m. Investigations by Commission; attendance of witnesses; depositions.

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 825k of Title 16, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

(c) For the purpose of any investigation or any other proceeding under this chapter, any member of

the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements or other records if in his or its power so to do in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) The testimony of any witness may be taken at the instance of a party, in any proceeding or investi-

gation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing be subscribed by the deponent.

(f) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

§ 717n. Hearings; rules of procedure.

(a) Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in ac-

cordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

§ 717o. Administrative powers of Commission; rules, regulations, and orders.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

§ 717p. Use of joint boards; cooperation with State commissions.

(a) The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of represenatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and re-

ports as may be of assistance in State regulation of nautral-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

§ 717q. Appointment of officers and employees.

The Commission may, subject to civil-service laws, appoint such officers and employees as are necessary for carrying out its functions under this chapter and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of Title 5.

§ 717r Rehearing; court review of orders.

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or

order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be tak n before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings. which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting

aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

§ 717s. Enforcement of chapter; regulations and orders.

(a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

§ 717t. General penalties.

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

§ 717u. Jurisdiction of offenses; enforcement of liabilities and duties.

The District Court of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction

constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

§ 717v. Separability of provisions.

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

§ 717w. Short title.

This chapter may be cited as the "Natural Gas Act."

18 Code of Federal Regulations § 154.102 provides:

§ 154.102 Suspended changes in rate schedules; motions to make effective at end of period of suspension; procedure.

(a) If a rate suspension proceeding initiated under section 4(e) of the Natural Gas Act has not been concluded and an order made at the expiration of the suspension period, the proposed change of rate, charge, classification, or service shall go into effect upon motion of the independent producer proposing the change as the legally effective rate and shall be charged, effective as of a date not earlier than the date of receipt of such motion by the Commission or the expiration of the suspension period, whichever is later. Three copies of the motion and any accompanying papers shall be filed. The Secretary, upon receipt of such a motion, shall, if the motion is legally adequate

for the purpose, notify the movant that the proposed change shall be effective as provided in this section: *Provided,* That the Secretary shall refer to the Commission any motion requesting that a change in rate, charge, classification, or service be made effective, if in his judgment the motion should receive the specific attention of the Commission;

(b)(1) Unless otherwise ordered by the Commission, increased rates or charges shall be charged and collected pursuant to paragraph (a) of this section and there shall be filed by the independent producer a surety bond, or other undertaking, to be approved by the Secretary, to comply with the provisions of paragraph (c) of this section.

(2) In compliance with subparagraph (1) of this paragraph, an independent producer may file a general undertaking affording blanket refund coverage of any present and future rate increases suspended under section 4(e) of the Natural Gas Act and collected subject to refund thereunder. Upon acceptance of such general undertaking, the producer need not file further refund assurance when filing a motion to make increased rates effective unless specifically required to do so by order of the Commission.

(c) Upon an increased rate being made effective pursuant to the provisions of this section the independent producer shall be obligated to keep accurate accounts in detail of all amounts received by reason of the increased rates or charges for each billing period, and for each purchaser; the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom, as computed under the rates in effect immediately prior to the effective date of the change, and under the rates which become effective pursuant to the motion, together with the differences in the revenues so computed; and to refund at such times and in such amounts to the persons entitled thereto, and in such manner as may be required by final order of the Commission, the portion of any increased rate found by the Commission in that proceeding not justified, together with interest thereon at the rate of seven percent per annum for all rate filings

tendered prior to October 10, 1974, and nine percent per annum for all rate filings tendered on or after October 10, 1974, from the date of payment to the producer until refunded, except as provided in paragraph (f) of this section; and to bear all costs of any such refunding.

(d) If the producer, acting in conformity with the terms and conditions of the bond or undertaking, makes the refunds as may be required by order of the Commission, the bond or undertaking shall be discharged; otherwise it shall remain in full force and effect;

(e) The bond or undertaking required by paragraph (b) of this section may be filed concurrently with the motion to make the increased rates effective. If with his motion the producer has not filed a satisfactory bond or undertaking such bond or undertaking must be filed within 30 days after the issuance of the Secretary's notice provided for in paragraph (a) of this section. Unless notified to the contrary by the Secretary of the Commission within 30 days from the date of filing, such bond or undertaking shall be deemed to be satisfactory and to have been accepted for filing.

(f) No interest is required to be paid on any portion of a refund which represents payments of royalties or taxes to Federal or State governmental authorities, except to the extent that such authorities pay interest to the producer when refunding overpayments of royalties or taxes.

Hugoton—Anadarko Rate Cases, 44 F.P.C. 761 (1970), Opinion 586, Docket No. AR 64-1, et al. Ordering paragraphs (D), (G) and (H) provide in pertinent part:

(D) The applicable area rate as defined in ordering paragraph (A) above, shall be effective from and after October 1, 1970, and any amounts collected in excess thereof on or after that date shall be collected subject to refund plus interest at 7 percent. * * *

(G) *Refund Reports.* On or before November 2, 1970, a refund report shall be filed with this Commission in triplicate, and one copy served on the buyer, by each respondent involved in one or more of the Section 4(e) proceedings set out in Appendix A to this decision and as to which refunds are required under the terms of this decision. Within 20 days from the filing of the refund report the buyer shall file its written concurrence or disagreement with such report. The report shall set forth the following information (if more than one rate schedule is involved the respondent shall supply the information for each schedule separately):

(i) The rate collected during the period subject to refund and the periods during which each rate was collected.

(ii) The volume of gas sold at each such rate.

(iii) The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate as defined herein subject to the provisoes of ordering paragraph (D).

(iv) The computation of the applicable area rate and the basis for any difference between it and the base area rate.

(v) The interest, at rates as specified in each Section 4(e) proceeding, on the above refundable excess revenues, subject to the limitation by Section 154.102(f) of the Commission's Regulations under the Natural Gas Act. The interest shall be calculated to September 1, 1970.

(H) *Treatment of Refunds.* Each respondent shall retain the amounts shown in the report required under ordering paragraph (G) subject to further order of the Commission directing the disposition of those amounts. If a respondent elects to commingle these retained refunds with its general assets and use for its corporate purposes, it is authorized so to do after notice to the Commission; and it shall pay interest thereon at the rate of 8 percent per annum on all funds thus available from the effective date of this order to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final

order of the Commission. If a respondent elects to deposit the retained refunds in a special escrow account, the respondent shall make such deposit and shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement, or a certificate attesting to the fact that it has executed such an agreement, in the form provided by Section 250.12 of Part 250 of the Regulations under the Natural Gas Act (18 CFR Part 250).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. CA-2-1356

PHILLIPS PETROLEUM COMPANY, *Plaintiff*,

v.

J. H. ADAMS, ET AL., *Defendants*.

Judgment and Memorandum Opinion

(February 7, 1974)

On this the 7th day of February, 1974 came on to be heard the above-entitled and numbered cause and there appeared in court by and through their attorneys the plaintiff, Phillips Petroleum Company, the defendants, J. H. Adams, Waylon Adams and Arlwone H. Adams, and the defendants, Robert O. Schnell, W. S. Etchieson, and L. Jack Gross, and all other parties having settled and compromised their claims, and the parties having announced ready for trial before the court without a jury, and introduced their evidence, and the court having considered the evidence, the entire record in this case, and the briefs and argument of counsel, has this day filed its Memorandum Opinion which constitutes the court's Findings of Fact and Conclusions of Law, here referred to and incor-

porated herein for all purposes. It therefore appears that judgment should be entered as follows:

I

That the said Robert O. Schnell, W. S. Etchieson and L. Jack Gross have no right, title or interest in and to the sum of $16,161.88 heretofore deposited by Phillips Petroleum Company with the Clerk of this court in this case, and all relief prayed for by these parties is DENIED.

II

That the following parties are hereby ADJUDGED to be entitled to and own and the Clerk of this court shall pay such sum of $16,161.88 to the parties of this suit as follows:

A. To Mary Ardath Thomson (formerly Mary Ardath Dunning, widow of Earnest H. Dunning, deceased,) the sum of $1,288.36.

B. To Patricia Nelson (formerly Patricia I. White, widow of Oadus White, deceased,) the sum of $2,576.71.

C. To J. H. Adams, Waylon Adams, and Arlwone H. Adams the sum of $12,296.81.

III

The counterclaim of J. H. Adams, Waylon Adams, and Arlwone H. Adams against Phillips Petroleum Company for interest is DENIED.

IV

Rosemary J. Walker and Don Walker, although duly served with summons, have failed to answer or appear herein, and it is hereby FOUND and ADJUDGED that the said Rosemary J. Walker and Don Walker are in default and it is further ADJUDGED that they have no right, title or interest in and to any of the funds in dispute in this case.

V

All relief prayed for by any of the parties hereto not granted specifically herein is DENIED.

VI

Costs are assessed against J. H. Adams, Waylon Adams and Arlwone H. Adams.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 7th day of February A.D. 1974.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

MEMORANDUM OPINION

On the 7th day of February, 1974 there appeared in open court the plaintiff, Phillips Petroleum Company, its counsel, and there also appeared, by and through their attorney, the defendants, J. H. Adams, Waylon Adams and Arlwone H. Adams, hereinafter referred to as "Adams Family," and there also appeared in open court by and through their attorney the parties to this suit, Robert O. Schnell, W. S. Etchieson, and L. Jack Gross, hereinafter called the "Schnell Group." It had been previously stipulated and agreed that all of the other parties to the controversy in question had agreed and compromised their respective claims as will hereinafter be more detailed.

This Memorandum Opinion shall serve as the court's Findings of Fact and Conclusions of Law, the case being tried before the court without a jury, and in addition to this opinion the stipulations and admissions of the parties set forth in the court's Pre-Trial Order dated January 31, 1974 are here adopted as a part of these Findings of Fact.

The dispute in this case concerns the production of gas from a lease containing 86.52 acres of land in Hutchinson

County, Texas. The gas in question, as stipulated to by the parties, was actually produced between the dates of July 1, 1963 when the Adams Family purchased this lease, Adams Ex. 4, and the date of June 1, 1967 when the Adams Family sold the lease in question to Robert O. Schnell. Adams Ex. 1.

On December 21, 1973 the plaintiff, Phillips Petroleum Company, deposited in the registry of this court the sum of $16,161.88 which sum of money represents additional moneys for the purchase price of the gas produced and sold between the above dates. At the time of the production of the gas in question Phillips Petroleum Company had paid the leasehold owners, pursuant to certain casinghead gas purchase contracts, Adams Exs. 2 and 3, the amount then approved as the correct amount to be paid by the Federal Power Commission. Subsequently, by a decision of the Federal Power Commission, Pltf's Ex. 3, effective October 1, 1970, an increase in the price of the gas produced was allowed for the periods involved in this case. The sum on deposit with the registry of this court represents this allowed increase in price for the gas produced and sold between July 1, 1963 and June 1, 1967, being the dates respectively that the Adams Family purchased the lease in question and sold the lease in question.

The decision of the Federal Power Commission was appealed to the courts, was affirmed, *The People of State of California, et al.* v. *Federal Power Commission,* 466 F.2d 974 (9th Cir. 1972), and the last date for the application for writ of certiorari by the parties to said case to the Supreme Court of the United States expired on October 28, 1972.

On January 26, 1972 a suit was filed in this court, *Spearman, et al.* v. *Phillips, et al.,* number CA-2-1159, to recover the moneys in question in this suit as well as certain other moneys not in dispute in this particular suit. Cause 2-1159 was compromised and settled among some of the parties

thereto and the lawsuit now under consideration was placed on the docket of this court to determine the dispute as to the ownership of the $16,161.88.

The pleadings in this cause show that the plaintiff herein, Phillips Petroleum Company, tendered the money into the court and these pleadings do not reveal that any of the parties ever demanded a deposit of the moneys with the Clerk although the plaintiff did deposit same on December 21, 1973 and they now remain on deposit.

The Schnell Group claims that the assignment of the lease to them, Adams Ex. 1, the division order signed by Adams and Schnell, page 3 of Pltf's Ex. 2, and certain prior actions of the Adams Family do in effect assign not only the oil and gas lease in question but operate to assign the funds in question in this case even though these funds represent part payment for gas produced and severed from the land prior to the effective date of the assignment from the Adams Family to the Schnell Group. The prior action relied upon is that when the Adams Family purchased the lease in 1963 from the Spearmans and subsequent to the purchase thereof, Phillips Petroleum Company had sent the Adams Family a check for four hundred plus dollars, which funds were similar to the funds in this case, and that the Adams Family's acceptance of this $400 check from their seller in 1963 constitutes evidence that when the Adams Family sold to the Schnell Group in 1967 that all similar funds would then be conveyed to the Schnell Group.

Two other matters remain in dispute; first, that is the claim of the Adams Family that Phillips Petroleum Company should be required to pay interest on the amount now on deposit with the Clerk of this court from the effective date of the Federal Power Commission decision on October 1, 1970 until the time that said sum was deposited with the Clerk of this court on December 21, 1973. Secondly, Phillips Petroleum Company, in its prayer for relief, asks

for its costs, but did not specifically mention attorney's fees. The Pre-Trial Order entered in this cause and agreed to by the attorneys for the parties hereto did not mention any claim for attorney's fees for the plaintiff and it was not until the hearing on the 7th day of February, 1974 that the plaintiff informed the court of its claim and presented evidence that it was entitled to $1,450 attorney's fees as a stakeholder. Even though the court finds that the amount of the fees is a reasonable amount, the court will deny recovery of any attorney's fees because the plaintiff did not specifically plead for same nor did it indicate a claim for attorney's fees in the proposed pre-trial order submitted to the court. Further, the court does not feel that attorney's fees are properly allowable in this case because, as admitted by counsel for plaintiff in argument, this particular case was in the nature of a "test" case that would control this court's rulings on similar issues in many other cases now pending that involve sums of money held and owed for the purposes as the funds in this case are. Accordingly when the judgment is entered this plea for attorney's fees will be denied.

Other evidence introduced for consideration by the court indicates and this court finds as a fact that at all material times hereto there has been a bona fide dispute between the Adams Family and the Schnell Group as to the true ownership of the money now held by the Clerk.

Based on the record in this case, the evidence introduced, the briefs and argument of counsel, the court is of the opinion that the Adams Family is the righful owner of the $16,161.88 subject to certain amounts to be paid out of said fund as stipulated in the Pre-Trial Order and that the Schnell Group has no interest in such sum. The money in question is in part payment of gas severed from the leasehold estate and sold therefrom prior to any assignment of the lease by the Adams Family. The documents assigning such lease pass only the leasehold title and the personal

property and equipment used or obtained in connection therewith and located thereon, Adams Ex. 1, and none of these documents can be construed to nor do they constitute an assignment of the moneys in question.

Further, as there was a bona fide dispute among the claimants to the money Phillips Petroleum Company was not obligated in any respect for the payment of interest on said money up until December 21, 1973, and when it paid the money into the registry of the court on said date it was relieved from any payment of interest subsequent thereto. Had the claimants previously made a demand, after the final effective date of the Federal Power Commission's decision, that the money be placed in the registry of the court, and had Phillips Petroleum Company refused to do so within a reasonable time, then the question of interest might be determined differently, but such are not the facts in this case.

Accordingly judgment will be entered distributing the money and awarding the money as follows:

1) To Mary Ardath Thomson (formerly Mary Ardath Dunning, widow of Earnest H. Dunning, deceased,) $1,288.36.

2) To Patricia Nelson (formerly Patricia I. White, widow of Oadus White, deceased,) the sum of $2,576.71.

3) To J. H. Adams, Waylon Adams, and Arlwone H. Adams the sum of $12,296.81.

A judgment will be entered accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 7th day of February A.D. 1974.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

SUPPLEMENTAL FINDING OF FACT

Supplementing the findings of fact set forth in the Court's Memorandum Opinion, filed in the above entitled action on February 7, 1974, the Court finds as a fact that the Four Hundred Dollars plus check mailed by Phillips Petroleum Company to the Adams Family was accompanied by a written statement reading as follows:

"NOTICE

"The enclosed check represents additional payment for royalties or for prior purchases of gas from you. This payment is based on rate increases for various sales of gas by Phillips Petroleum Company which have been finally approved by the Federal Power Commission. These increases were originally suspended by the Commission and later put into effect by Phillips subject to refund. The Commission's decision allowing these increases was appealed to the U.S. Supreme Court by other parties, and the decision of the court affirming the Commission's decision has just recently become final.

"The increases on which the enclosed payment is based were filed at various times prior to January 1, 1957. Each of these increases has been superseded by a later increase which was also suspended by the Commission. The enclosed payment covers only that period from the time each of these increases became effective until the following increase became effective subject to refund. None of the later increases has yet been considered by the Commission. Further additional payments will be made to you from time to time if and when such later increases are approved in whole or in part.

"This payment will not result in any change in the price currently being paid you for royalties or for gas purchased from you.

Phillips Petroleum Company
Bartlesville, Oklahoma"

ENTERED this 5th day of March, 1974.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

Supplemental Conclusions of Law

Supplementing the Conclusions of Law set forth in the Court's Memorandum Opinion, filed in the above-entitled action on February 7, 1974, the Court finds, as an initial determination, that the counterclaims are proper under Rule 13, Federal Rules of Civil Procedure, and that the court has jurisdiction to hear and determine the counterclaims. Phillips' technical argument that they are not an "opposing party" within the meaning of Rule 13 is not persuasive. Phillips in its Complaint prays that it be discharged from all liability in connection with the fund, which would, of course, include discharge from any liability for interest. Phillips is asking for affirmative relief against the defendants and, therefore, this court feels compelled to characterize them as opposing parties for the purposes of Rule 13, *supra*. Further, the court finds that defendants' counterclaims are "compulsory" within the meaning of Rule 13(a). Clearly, the claims for interest arose "out of the transaction or occurrence that is the subject matter of the opposing party's claim." Accordingly, there is no jurisdictional amount requirement as to the counterclaims and the court has ancillary jurisdiction over them. *Childress* v. *Cook*, 245 F.2d 798 (5th Cir. 1957).

Dated this 11th day of March, 1974.

/s/ Halbert O. Woodward
Halbert O. Woodward
United States District Judge

Text of Stipulations and Admissions of the Parties, Numbers 1-32, Incorporated by Reference into the District Court's Memorandum Opinion as Findings of Fact.

The parties admit the following:

1. That on January 22, 1951, Neil Johnson, et al., as lessor, executed and delivered to Earl C. H. Walker, as lessee, an Oil, Gas and Mineral Lease covering the following described property, to wit:

> The North and East 86.52 acres out of the East One-Half (E/2) of Survey 4, Excluding the South and West 42.93 acres of said survey, Block "V", Dave Blaker, Original Grantee, Astract Number 1167, S. F. 7941, described by metes and bounds as follows:
>
> Beginning at a point, the same being the Southwest corner of Section 71, H&TC Railway Company Survey, Hutchinson County, Texas;
>
> Thence East 2640 feet along the South line of Section 71 to a point, the same being the Southeast corner of Section 71;
>
> Thence North 338 feet along the East line of said Section 71 to a point, the same being the Southwest corner of Section 70;
>
> Thence East 1,072.2 feet along the South line of Section 70 to a point;
>
> Thence South 1,334.2 feet along the East line of Survey 4, Block "V", Dave Blaker, Original Grantee Survey, to a point;
>
> Thence West 1,557.8 feet along the North line of the Cody Oil Company lease to a point;
>
> Thence North 86° 14′ 13″ West a distance of 2,148.3 feet to a point, the same being the Southeast corner of Section 72;
>
> Thence North along the East line of Section 72 a distance of 800 feet to the point of beginning, and consisting of 86.52 acres, more or less;

which lease, hereinafter called the "Neil Johnson Lease", is recorded in Volume 144, at page 3 of the Deed Records of Hutchinson County, Texas. The above-described tract is referred to hereinafter as "subject property."

2. That by assignment dated December 8, 1952, and recorded in Volume 151 at page 505 of the Deed Records of Hutchinson County, Texas, the said Earl C. H. Walker assigned to Blanard W. Spearman all of the gas rights (except casinghead gas) and an undivided 1/32 to 8/8 overriding royalty interest on oil and other minerals produced under the terms of the Neil Johnson lease.

3. That by assignment dated February 20, 1960, and recorded in Volume 242 at page 641 of the Deed Records of Hutchinson County, Texas, the said Earl C. H. Walker assigned to the said Blanard W. Spearman all of the right, title and interest owned by the said Earl C. H. Walker in the Neil Johnson lease.

4. That by assignment dated February 20, 1960, and recorded in Volume 244 at page 644 of the Deed Records of Hutchinson County, Texas, Blanard W. Spearman assigned to Rosemary J. Walker and her husband, Earl C. H. Walker, an undivided 17/144 of an 8/8 overriding royalty interest on the casinghead gas produced and sold from the Neil Johnson lease.

5. That on July 1, 1963, Blanard W. Spearman owned a 49/64 working interest in the Neil Johnson lease, subject to the overriding royalty interest described in paragraph IV, hereinabove.

6. That by assignment dated July 11, 1963, recorded in Volume 288 at page 39 of the Deed Records of Hutchinson County, Texas, to be effective July 1, 1963, the said Blanard W. Spearman assigned all of his right, title and interest in the Neil Johnson lease (being a 49/64 working interest subject to an overriding royalty interest) to J. H. Adams.

7. That the said J. H. Adams, in turn, assigned an undivided 1/4 interest in the Neil Johnson lease to Waylon Adams by assignment dated May 21, 1964, recorded in Volume 300 at page 36 of the Deed Records of Hutchinson County, Texas.

8. That additional undivided 1/4 interest in the Neil Johnson lease was assigned by the said J. H. Adams to Arlwone H. Adams by assignment dated May 21, 1964, and recorded in Volume 300 at page 39 of the Deed Records of Hutchinson County, Texas.

9. That J. H. Adams, Waylon Adams, and Arlwone H. Adams, by instrument of assignment dated June 5, 1967, recorded in Volume 336 at page 126 of the Deed Records of Hutchinson County, Texas, a true copy of which is attached hereto and marked Exhibit "A", assigned the subject property and certain rights, title and interests enumerated in said instrument to Robert O. Schnell.

10. That by assignment dated June 6, 1967, recorded in Volume 336 at page 129 of the Deed Records of Hutchinson County, Texas, Robert O. Schnell assigned all of his right, title and interest in the Neil Johnson lease to W. S. Etchieson and L. Jack Gross.

11. That W. S. Etchieson and L. Jack Gross, by assignment dated September 27, 1968, recorded in Volume 349 at page 106 of the Deed Records of Hutchinson County, Texas, reassigned their interest in the Neil Johnson lease to Robert O. Schnell.

12. That on January 2, 1964, by virtue of an execution issued out of the District Court of Hutchinson County, Texas, on November 30, 1964, in Cause No. 11,428, wherein Oadus White and James Blair were plaintiffs and Earl C. H. Walker was defendant, the Sheriff of Hutchinson County did levy on the 17/144 of 8/8 overriding royalty interest, described hereinabove in paragraph IV, and on the 1st Tuesday in January 1964, sold the same at public

auction to Oadus White, as evidenced by the Sheriff's Deed dated January 5, 1965, recorded in Volume 308 at page 699 of the Deed Records of Hutchinson County, Texas.

13. That by assignment dated January 5, 1965, and recorded in Volume 310 at page 17 of the Deed Records of Hutchinson County, Texas, Oadus White assigned to Earnest H. Dunning an undivided one-third (1/3) interest in and to that certain overriding royalty interest conveyed to Oadus White by the Sheriff of Hutchinson County, Texas.

14. That on January 12, 1968, Earnest H. Dunning died in Borger, Texas. Presently, Mary Ardath Thomson (formerly Mary Ardath Dunning, widow of Earnest H. Dunning, deceased) owns an undivided one-third (1/3) interest in and to that certain overriding royalty interest conveyed in and to that certain overriding royalty interest conveyed to Oadus White by the Sheriff of Hutchinson County, Texas.

15. That on October 26, 1972, Oadus White died in Borger, Texas. Presently, Patricia Nelson (formerly Patricia I. White, widow of Oadus White, deceased) owns an undivided two-thirds (2/3) interest in and to that certain overriding royalty interest conveyed to Oadus White by the Sheriff of Hutchinson County, Texas.

16. That while the Adams Family owned and operated subject property, the produced casinghead gas which was sold to Phillips under certain casinghead gas purchase agreements, more particularly described hereinafter.

17. That on or about March 29, 1957, Phillips, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 200 at page 178 of the Deed Records of Hutchinson County, Texas. a true copy of which is attached hereto and marked Exhibit "B") with B. W. Spearman and G. E. Hatton, as seller, to purchase casinghead gas produced from wells located on subject property. Said contract, in paragraphs 7 and 8, provided that seller was to receive

as a part of the payment due him, for the gas sold by him to Phillips, a sum computed in relation to the price for which Phillips sold any gas within the Panhandle Field of Texas to third parties. Said contract was superseded and terminated by a Casinghead Gas Contract dated September 1, 1966, described hereinbelow.

18. That on or about September 1, 1966, Phillips, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 331 at page 59 of the Deed Records of Hutchinson County, Texas, a true copy of which is attached hereto and marked Exhibit "C") with the Adams Family, doing business as J. H. Adams Oil Company, as seller, to purchase casinghead gas produced from wells located on subject property. Said contract, in paragraphs 7 and 8, provided that seller was to receive as a part of the payment due him, for the gas sold by him to Phillips, a sum computed in relation to the price for which Phillips sold any gas within the Panhandle Field of Texas to third parties.

19. That by various orders issued since the United States Supreme Court, on June 7, 1954, decided *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 346 U. .S. 672, 74 S. Ct. 794, 98 L. Ed. 1036, and determined that Phillips, as an independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale, was a "natural gas company" within the Natural Gas Act, the Federal Power Commission (FPC) suspended increases in prices for sales of residue gas filed by Phillips and permitted such increases to be collected beginning at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing a corporate undertaking with the FPC to refund all or any portion of such increases which the FPC might not find to have been justified.

20. That subsequent to June 7, 1954, Phillips sold gas obtained under the above-referenced casinghead gas contracts, and other contracts, subject to the jurisdiction of

the FPC, at prices, a portion of which had not been approved by the FPC; the increased sales prices of the gas were collected by Phillips subject to a duty to refund the same to the purchasers in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act (15 U.S.C. - 717c(e); and until such time as the FPC approved such increased sales prices or a portion of said prices, there was no right in the Adams Family, the Schnell Group, the Walker Family, Thomson or Nelson to recover from Phillips any such monies held subject to refund.

21. That Phillips chose to collect the higher rates subject to refund if the rates were not approved because increases in gas sales prices not made effective subject to FPC approval cannot be made retroactive. If Phillips had not collected the higher rates subject to refund, the owners of the casinghead gas contract rights could not receive, as part payment due them under said contracts, a sum computed in relation to the higher price for which Phillips sold gas within the Panhandle Field of Texas to third parties.

22. That Phillips had applications before the FPC requesting permission to increase the prices for sales of residue gas and such applications, for this area, were consolidated in FPC Dockets AR 64-1, et al.

23. That on September 18, 1970, the FPC issued Opinion 586, Dockets No. AR 64-1, et al., Hugoton-Anadarko Rate Cases, 44 FPC 761, which established sales prices applicable to gas sales and established refund requirements; on July 31, 1972, the Court of Appeals for the Ninth Circuit affirmed the above-said Opinion 586 in *The People of State of California, et al.* v. *Federal Power Commission,* No. 71-1036, reported at 466 F.2d 974, et seq., and, as of October 28, 1972, no writ of certiorari was filed by any of the parties to said Ninth Circuit action.

24. That after Opinion 586 became final, the monies collected subject to refund could be divided into two classes "sustainable" money and "refundable" money. The "sustainable" monies are those which, according to Opinion 586, represent lawful proceeds from the sales of gas. It is from these lawful proceeds that the parties from which Phillips purchased casinghead gas receive, as their part payment, a sum computed in relation to the price for which Phillips sold gas within the Panhandle Field of Texas to third parties. The "refundable" monies are those which, according to Opinion 586, represent sums in excess of the just and reasonable rate; i. e., the sums in excess of the lawful proceeds from the sales of gas.

25. That this action does not involve "firm proceeds"; that is, the proceeds derived from sales of gas within the Panhandle Field of Texas to third parties at prices which were at or below the rate which had already been approved by the FPC. Such firm proceeds were all paid in a timely manner in accordance with paragraph 9 of each of the casinghead gas contracts referred to hereinabove.

26. That on and after October 28, 1972, and under the sales prices approved by the FPC in Opinion 586, a sum of money equal to the sustainable portion of the money collected subject to refund, attributed to a 49/64 working interest in the Neil Johnson lease covered by the casinghead gas contract referenced hereinabove for the period from July 1, 1963, through May 31, 1967, and to the gas contracts covering the subject property, that is, $16,161.88 became due and payable to the lawful owner or owners of said monies.

27. That of the $16,161.88, the sum of $1,006.85 is attributable to the overriding royalty interest prior to January 1, 1965; the sum of $2,858.22 is attributable to the overriding royalty interest on and after January 1, 1965. The total sum attributable to the overriding royalty inter-

est is $3,865.07. The balance of the $16,161.88 which is $12,296.81, is the sum of the money, the ownership of which is in dispute between the Adams Family and the Schnell Group.

28. That by an instrument entitled Assignment of Oil and Gas Lease, dated June 5, 1967, recorded in Volume 336 at page 126 of the Deed Records of Hutchinson County, Texas, said instrument to be effective as of June 1, 1967, at 7:00 a.m., a true copy of which is attached hereto as Exhibit "A", the Adams Family assigned the subject property and certain rights, title and interests enumerated in the said instrument to the Schnell Group.

29. That the Adams Family has not been paid any portion of the above-said $12,296.81, and all parties admit and agree that either the Adams Family or the Schnell Group is entitled to this sum of money from Phillips.

30. That the Adams Family and the Schnell Group admit and agree that they do not claim to be entitled to any part of the $$3,865.07 referenced hereinabove; and that Thomson and Nelson admit and agree that they do not claim to be entitled to any part of the $12,296.81 referenced hereinabove.

31. The Walker Family were served with summons on April 16, 1973, but have not filed an answer herein and are in default. The controversy between the Walker Family and Thomson and Nelson which existed as to the sum of $1,006.85 attributable to the overriding royalty interest prior to January 1, 1965, was resolved when the Walker Family declined to file their answer in this action.

32. That neither Thomson nor Nelson has been paid any portion of the above-said $3,865.07, and all parties admit and agree that Nelson is entitled to receive two-thirds (2/3) of the $3,865.07 or the sum of $2,576.71; and all parties agree that Thomson is entitled to receive one-third (1/3) of the $3,865.07 or the sum of $1,288.36.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1777

PHILLIPS PETROLEUM COMPANY, *Plaintiff-Appellee,*

v.

J. H. ADAMS, ET AL., *Defendants.*

ROBERT O. SCHNELL, W. S. ETCHIESON, and JACK GROSS,
Defendants-Appellants,

v.

J. H. ADAMS, WAYLON ADAMS, and ARLWONE H. ADAMS,
Defendants-Appellees and Appellants.

Appeals from the United States District Court for the Northern District of Texas

Judgment

(May 22, 1975)

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee and defendants-appellants pay equally to defendants-appellees-appellants, the costs on appeal to be taxed by the Clerk of this Court.

(Caption Omitted in Printing)

Opinion

May 22, 1975

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

GOLDBERG, *Circuit Judge:*

In this case of first impression, and in two similar cases also decided today, First National Bank v. Phillips Petroleum Co., 5 Cir. 1975, 513 F.2d 371 [May 22, 1975, No. 74-2230], and Phillips Petroleum Co. v. Riverview Gas Compression Co., 5 Cir. 1975, 513 F.2d 374 [May 22, 1975, No. 74-2009], we must determine the rightful owners of funds payable by a pipeline company under contracts for the sale of casinghead gas,[1] where the gas underlying the debts was produced while the mineral leases were held by claimants who assigned their leasehold interests to other claimants before the debt owed by the pipeline company became due and payable.[2] After certain preliminary skirmishing,

[1] "Casinghead gas" is a term used in the oil and gas industry to describe the gas which flows from the casinghead of an oil well. The production of this type of gas is usually considered incident to the production of oil from the same sources. *See generally* Read v. Britain, Tex.Civ.App. 1967, 414 S.W.2d 483, aff'd, Tex. 1967, 422 S.W. 2d 902; Hardwicke, Evolution of Casinghead Gas Law, 8 Tex.L.Rev. 1 (1929).

[2] The problem presented by these three cases has attained epidemic proportions in the Texas Panhandle. By the time these cases were orally argued before this Court, in December, 1974, there were seven similar actions on the civil docket in the United States District Court for the Northern District of Texas, Amarillo Division, and three other such cases in the Texas courts. Phillips says that it has 966 percentage-of-proceeds contracts of the type involved here in the Texas Panhandle alone; $9,700,000 in payments is now due under these contracts.

the pipeline company brought this diversity interpleader action to obtain a judicial resolution of its contractual difficulties. The assignor-claimants (those who held the leasehold interest at the time the gas was produced) counterclaimed against the pipeline company for interest on the funds held by the company. After a trial without a jury, the district court decided that the assignor-claimants ought to have the principal sum involved but that the pipeline company owed them no interest; the pipeline company, the assignor-claimants and the assignee-claimants all appeal. We affirm the district court's decision as to the ownership of the principal sum; we believe, however, that equity requires that the assignor-claimants should receive interest as well, so we must reverse that portion of the judgment below relating to interest.

I

On July 1, 1963, the assignor-claimants [the Adams family] purchased an oil and gas lease on property situated in Hutchinson County, in the Texas Panhandle. At the time of this purchase, a casinghead gas contract was in force between Phillips Petroleum Company [Phillips] and the holders of the mineral rights to the property. This contract provided that Phillips would purchase the casinghead gas produced on the lease and would pay therefore a price based on the price which Phillips itself obtained for all gas sold by it which originated in the Panhandle Field of Texas. In September 1, 1966, the Adams family concluded another percentage-of-proceeds gas sales agreement with Phillips which was substantially similar to the one in force from 1963 until 1966.

In 1967, one Schnell, a friend of one of the Adamses, expressed interest in purchasing the mineral leasehold interest in the Hutchinson County property. A deal was soon worked out, and on June 5, 1967, the Adams family conveyed to Schnell "all right, title and interest of the

Original Lessee and present owners in and to [the lease in question], and rights thereunder . . . together with all personal property and equipment used or obtained in connection therewith, and located thereon . . .'' The assignment was to be effective as of June 1, 1967, at 7 a.m. The very next day, Schnell conveyed his interest in the property to two business associates, Etchieson, a recently-retired Phillips executive, and Gross. On September 27, 1968, Etchieson and Gross reconveyed their interests to Schnell, who held title to the mineral rights in question when this lawsuit commenced. We shall henceforth refer to Schnell, Etchieson and Gross as ''the Schnell group.''

The difficulty in this case arises from the pricing provision in the casinghead gas contracts, for just as the price Phillips undertook to pay to the holder of the mineral rights was pegged upon the average price of gas sold in the Panhandle Field, that field price was in turn dependent upon the rate that the Federal Power Commission allowed Phillips to charge for its gas, which latter variable was very variable indeed until long after the Adams family had assigned its lease to Schnell. In 1954, in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, the United States Supreme Court determined that the Natural Gas Act, 15 U.S.C. § 717 et seq., [the Act] requires the Federal Power Commission to regulate wellhead sales by producers of natural gas to interstate pipeline companies for interstate transportation and resale. From that time, gas prices charged by pipeline companies such as Phillips have been subject to FPC approval.

In the nature of things, pipeline companies desire to raise their gas prices from time to time, and, also in the nature of things, the wheels of the FPC's rate-setting mechanism grind slowly, at best. To add to the obvious difficulties attendant upon long waits for approval of price increases, a pipeline company may not file retroactive price increases, 15 U.S.C. § 717c(d) and (e); Atlantic Refining

Co. v. Public Service Commission, 1959, 360 U.S. 378, 389, 79 S.Ct. 1246, 1253, 3 L.Ed.2d 1312, 1319-20; Shell Oil Co. v. FPC, 3 Cir. 1964, 334 F.2d 1002, 1009; *see* 18 C.F.R. § 154.102,[3] so that if a pipeline company were to wait for FPC approval of a proposed price hike, it might very well

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[3] Section 717c provides, in pertinent part:

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
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> • • • • •
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> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, . . . and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.
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> • • • • •
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> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, . . . but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, . . . may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer-period than five months beyond the time when it would otherwise go into effect, and after full hearings, . . . the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after

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lose ten years' worth of increased prices. Congress has resolved this difficulty by allowing a pipeline company to increase its prices on its own initiative, subject to a five-month suspension period which may be imposed by the FPC, and subject to a duty to refund to its purchasers any portion of the increase that the FPC ultimately fails to approve. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.102.[4]

it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may . . . require the natural-gas company to furnish a bond . . . to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

[4] *See generally* Placid Oil Corp. v. FPC, 5 Cir. 1973, 483 F.2d 80, aff'd sub nom. Mobil Oil Corp. v. FPC, 1974, 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed.2d 72; Phillips Petroleum Co. v. FPC, 10 Cir. 1965, 349 F.2d 535; Comment, Refund Beneficiaries and Refund Benefits Under the Natural Gas Act, 41 U.Chi.L.Rev. 792 (1974).

18 C.F.R. § 154.102 provides, in part:

(a) If a rate suspension proceeding initiated under section 4(e) of the Natural Gas Act has not been concluded and an order made at the expiration of the suspension period, the proposed change of rate, charge, classification, or service shall go into effect upon motion of the independent producer proposing the change as the legally effective rate and shall be charged, effective as of a date not earlier than the date of receipt of such motion by the Commission or the expiration of the suspension period, whichever is later.

• • • • •

(b)(1) Unless otherwise ordered by the Commission, increased rates or charges shall be charged and collected pur-

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The FPC may also order the pipeline company to pay seven per cent interest on refunded monies if equitable considerations so dictate. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.102(c).[5]

The effect of this regulatory scheme is that the pipeline company collects the increased prices for years and

suant to paragraph (a) of this section and there shall be filed by the independent producer a surety bond, or other undertaking, to be approved by the Secretary, to comply with the provisions of paragraph (c) of this section.

(2) In compliance with subparagraph (1) of this paragraph, an independent producer may file a general undertaking affording blanket refund coverage of any present and future rate increases suspended under section 4(e) of the Natural Gas Act and collected subject to refund thereunder. Upon acceptance of such general undertaking, the producer need not file further refund assurance when filing a motion to make increased rates effective unless specifically required to do so by an order of the Commission.

(c) Upon an increased rate being made effective pursuant to the provision of this section the independent producer shall be obligated to keep accurate accounts in detail of all amounts received by reason of the increased rates or charges of each billing period, and for each purchaser, the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom, as computed under the rates in effect immediately prior to the effective date of the change, and under the rates which became effective pursuant to the motion, together with the differences in the revenues so computed; and to refund at such times and in such amounts to the persons entitled thereto, and in such manner as may be required by final order of the Commission, the portion of any increased rate found by the Commission in that proceeding not justified, together with interest thereon at the rate of seven percent per annum from the date of payment to the producer until refunded.

[5] *See* Hunt Oil Co. v. FPC, 5 Cir. 1970, 424 F.2d 982; Texas Eastern Transmission Corp. v. FPC, 5 Cir. 1962, 306 F.2d 345, cert. denied sub nom. Manufacturers Light & Heat Co. v. Texas Eastern Transmission Corp., 1963, 375 U.S. 941, 84 S.Ct. 347, 11 L.Ed.2d 273; Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Co., S.D.Tex. 1960, 201 F.Supp. 679, aff'd sub nom. Socony Mobil Oil Co. v. Brooklyn Union Gas Co., 5 Cir. 1962, 299 F.2d 692, cert. denied, 371 U.S. 887, 83 S.Ct. 182, 9 L.Ed.2d 121.

years, using the funds thus collected as it pleases, although it will ordinarily characterize this "suspense money" as a liability for accounting purposes. *See* Ashland Oil & Refining Co. v. Staats, Inc., D.Kan. 1967, 271 F.Supp. 571, 578. Then, one fine day, the FPC tells the pipeline company which portion of the funds it can keep and which portion it must refund to its purchasers, with interest. At this point, the pipeline company, such as Phillips in this case, must recompute the price it must pay to its suppliers under percentage-of-proceeds production agreements such as the ones involved here.[6] Where the ownership of the mineral leasehold interest does not change during the ten or fifteen years in which the FPC is pondering the proposed price increase, all the pipeline company need do is to send a check along to the current leaseholder. Where, as here, the leasehold has changed hands in the interim, the pipeline company's task is more difficult.

In this case, Phillips filed a proposed price increase with the FPC subsequent to the Supreme Court's decision in Phillips Petroleum Co. v. Wisconsin, *supra,* and charged its customers the higher price, subject to refund, during the period in which the Adams family held the leasehold interest in the property involved in this lawsuit. From 1963 until 1967, Phillips made monthly payments to the Adams family, based only on the "firm proceeds" of its own sales, that is, proceeds calculated on the rate which the FPC had already approved; the pipeline company deferred any payments calculated on the basis of the higher, unapproved prices which Phillips was actually charging its

[6] Phillips urges that it really has no obligation to recompute the price it must pay to its suppliers under percentage-of-proceeds contracts, and that the Adams family consequently ought not to question such beneficence as Phillips might demonstrate. We believe that the law of contract obliges Phillips to pay in full for the gas that it purchases, regardless of the time at which the full measure of payment may be revealed.

customers throughout the period. On September 18, 1970, the FPC finally concluded its deliberations on Phillips' proposed rate hikes, approving a portion of the price increases but rejecting another portion.[7] Hugoton-Andarko Rate Case, Op: 586, 44 F.P.C. 761, aff'd, 9 Cir. 1972, 466 F.2d 974. After the Ninth Circuit affirmed the FPC's order, Phillips divided the principal sum of the suspense money collected over the years into two categories: "refundable monies," which it returned to its purchasers with interest, and "sustainable monies," to which it now had certain entitlement. But a portion of these sustainable monies represented certain debts payable to all producers who had supplied Phillips with gas under percentage-of-proceeds contracts. With respect to the particular property involved here, Phillips determined that the Schnell group was the undisputed owner of all sustainable monies due on gas produced after June 1, 1967, and Phillips settled a dispute with the Adams family's predecessors in interest with respect to monies collected before 1963. It was readily apparent, however, that the Adams family and the Schnell group were irremediably antagonistic with respect to the 1963-1967 funds so Phillips brought this interpleader action to determine title to $12,296.81, which sum was the amount that Phillips owed either to the Adams family or to the Schnell group for gas purchased during 1963-1967.[8]

II

The district court ruled that the Adams family ought to receive the disputed suspense money, on the ground that the payments were "in part payment of gas severed

[7] The effective date of the order was October 1, 1970.

[8] Phillips actually deposited $16,161.88 into court, but $3,865.07 of this sum is attributable to an undisputed overriding royalty interest.

from the leasehold estate and sold therefrom prior to any assignment of the lease by the Adams family," and that the document of assignment from the Adams family to Schnell could not be construed to constitute an assignment of the suspense money. The Schnell group and Phillips [9] argue that the money was not due and payable until after the FPC order in *Hugoton-Andarko,* and contend that since the order was not made until well after the Adams family had conveyed its leasehold interest to Schnell, the contingent right to the money attached to the mineral estate. In these circumstances, Schnell and Phillips conclude that since the Adams family did not expressly reserve this contingent right in the instrument of assignment, the right to any suspense money passed to Schnell. Schnell urges that even though the gas for which the disputed funds are partial payment was produced while the Adams family held the leasehold interest, the right to payment did not become certain and enforceable until after the FPC order, so that this case is analogous to decisions involving dividends on stock, interest on notes and unaccrued rent on real estate, where the income goes to the party who holds title to the principal property on the date the dividend, interest or rent is declared or becomes due.

The Schnell group and Phillips are undoubtedly correct in their contention that the Adams family had no enforceable right to the suspense money during the time when they held the leasehold interest, for neither Phillips nor the Adams family had any reasonable expectation during 1963-1967 that the FPC would approve the higher prices upon which the suspense money was based. Neither party could claim full title to any part of the disputed funds

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[9] Although Phillips is the stakeholder in this interpleader action, the pipeline company has from the beginning urged the validity of the Schnell group's claim as against that of the Adams family, for the reason that the Schnell group, unlike the Adamses, does not claim interest on the suspense money from Phillips.

until the FPC had determined the validity of the price increases.

In Ashland Oil & Refining Co. v. Staats, Inc., D.Kan. 1967, 271 F.Supp. 571 individuals situated similarly to the Adams family here demanded that a pipeline company pay them suspense money *before* the FPC had taken any action on the suspended price increase which had produced the funds. The district court reasoned that the right to payment of the parties analogous to the Adams family:

> can be no greater than the leese's right to the monies from which those royalties derive. Ashland [the pipeline company] has no final enforceable right to these funds for they have not been approved, and may be rescinded. [The pipeline company] holds them subject to refund, and is responsible for any refund which may be ordered. We perceive no ground on which Ashland should be compelled to pay out sums, for the refund of which it may be liable, and as to which its own right is not finally determined, to royalty owners whose own right to royalties from those funds will be finally determined only when Ashland's own right is determined . . . . If Ashland were required to pay over funds which it now holds, and a refund of all or any part thereof were subsequently ordered, it would have to demand repayments from a large number of royalty owners, and risk the necessity of a multiplicity of legal actions. Ashland has taken a course designed and intended best to serve the interest of the royalty owners and of itself. As a result, it holds the sums sought in what is roughly analogous to a fiduciary capacity. In our view, [the royalty owners have] stated no right to recover royalties on these funds, when it is not yet finally determined that they represent lawful proceeds from the sale of gas.

271 F.Supp. 571, 579.

We believe that the *Staats* court correctly stated the law governing Phillips' contractual relations with the Adams family during 1963-1967. *See* Boutte v. Chevron Oil Co., E.D.La. 1970, 316 F.Supp. 524 aff'd, 5 Cir. 1971, 442 F.2d

1337.[10] The fact that the Adams family had no final and enforceable right to the suspense money in 1963-1967, however, does not foreclose the possibility that they retained the contingent right to the funds after their assignment to Schnell and that the FPC's 1970 order converted that contingent right into a right presently enforceable against Phillips. The resolution of this question requires us to investigate the Texas law of contract and property.

It is the law in Texas, as elsewhere, that where a contract is unambiguous, we must look solely to the terms thereof to determine its meaning. Hennigan v. Chargers Football Co., 5 Cir. 1970, 431 F.2d 308; Tenneco Oil Co. v. Alvord, Tex. 1967, 416 S.W.2d 385; Wahlenmaier v. American Quasar Petroleum Co., Tex.Civ.App. 1974, 517 S.W.2d 390, no writ. All of the parties here agree that the instrument of assignment is unambiguous, and that document alone can show which property interests passed to Schnell and which were retained by the Adams family. The Adams family conveyed to Schnell:

> all right title and interest . . . in and to [the lease], and rights thereunder, . . . together with all personal property and equipment used or obtained in connection therewith, and located thereon . . . [The Adams family also warranted that they] are the lawful owners of the interest in said oil and gas lease . . , and of

[10] We note that Phillips does not always hold suspense money in its own accounts until the FPC approves or disapproves the underlying rate increases. The record contains two form letters from Phillips, one written to Etchieson of the Schnell group, dated February 20, 1968, and the other written to the Adams family with regard to another piece of property, dated August 13, 1971, in which Phillips (apparently at the request of Etchieson and the Adams family) agreed to pay suspense money to the addressees *as it was collected*, on the condition that they would agree to reimburse Phillips, with interest, for any suspense money which the FPC might require Phillips to refund to its customers. The approach adopted by Phillips in those instances would obviate the difficulties presented by this case.

> all personal properties thereon, or used in connection therewith; . . and that said rights, interest and property are free and clear from all liens and encumbrances, and that all rentals and royalties due and payable under said oil and gas lease have been fully paid.
>
> This oil and gas lease shall be effective as of June 1, 1967, at 7:00 A.M..

The assignment appears on its face to pass title to all realty interests, effective as of 7:00 A.M. on a day certain, and all personal property interests bound up with the operation of the wells; there is no mention of the right to the suspense money or of any other personally unrelated to the extraction process. In a conveyance of real property, all of the interests in land ordinarily pass to the grantee unless specifically exempted, for deeds are strictly construed against the grantor. Tenneco Oil Co. v. Alvord, *supra;* Humble Oil & Refining Co. v. Harrison, 1947, 146 Tex. 216, 205 S.W.2d 355; Melton v. Davis, Tex.Civ.App. 1969, 443 S.W.2d 605, writ ref'd n.r.e. On the other hand, it is usually the case that personal property does not pass in the assignment of an oil and gas lease unless it is expressly passed. *See e.g.*, Moore v. Carey Bros. Oil Co., Tex. Comm'n. App. 1925, 269 S.W. 75; Cox v. Rhodes, Tex.Civ. App. 1950, 233 S.W.2d 924; Continental Oil Co v. Gillespie, Tex.Civ.App. 1944, 178 S.W.2d 728, no writ; East Texas Refining Co. v. Helvir Oil Co., Tex.Civ.App., 1935, 82 S.W.2d 392, writ dism'd w.o.j.; 3 W. Summers Oil and Gas § 555. Thus, the problem in this case is whether the contingent right to the suspense money constituted a realty or a personalty interest. If the right to the money is a realty interest, the assignment passed that right to Schnell, but if the right is in the nature of personalty, the Adams family did not expressly convey the right and therefore retained it.

Texas law provides that oil and gas are realty when in place and personalty when severed from the land by production. Harrington v. Texaco, Inc., 5 Cir. 1964,

339 F.2d 814, cert. denied, 1965, 381 U.S. 915, 85 S.Ct. 1538, 14 L.Ed.2d 435; Humble Oil & Refining Co. v. West, Tex. 1974, 508 S.W.2d 812; Phillips Petroleum Co. v. Mecom, Tex.Civ.App. 1964, 375 S.W.2d 335, no writ; Lone Star Gas Co. v. Murchison, Tex.Civ.App. 1962, 353 S.W.2d 870, writ ref'd n.r.e. With respect to debt obligations incurred as oil and gas are produced, unaccrued royalty interest, oil payments and bonus payments are deemed by Texas courts to be interests in realty, for such rights represent interests in the oil and gas still in place on the property. *See* Clyde v. Hamilton, Tex. 1967, 414 S.W.2d 434; Tennant v. Dunn, 1937, 130 Tex. 285, 110 S.W.2d 53; Sheffield v. Hogg, 1935, 124 Tex. 290, 77 S.W.2d 1021, on rehearing 124 Tex. 311, 80 S.W.2d 741; *see generally* Walker, Oil Payments, 20 Tex.L.Rev. 259 (1942). The rule is otherwise when the minerals giving rise to the right to payment have already been taken from the ground, for the right to future payments on past production cannot be said to burden the mineral estate in the same way as an interest in future production. The right to payment for past production obviously has no effect upon the value to the leaseholder of the oil and gas still in the ground at the time the mineral estate changes hands—which property is the usual object of leaseholder interest. So it is that accrued royalty interests are personal property, Miller v. Hathaway, Tex.Civ.App. 1972, 477 S.W.2d 655, no writ, as is the right to payment for severed minerals. Shell Oil Co. v. State, Tex.Civ.App. 1969, 442 S.W.2d 457, writ ref'd n.r.e.

The district court here reasoned that since the disputed funds are partial payment for gas produced while the Adams family held the leasehold interest, those individuals also held a contingent personal right to payment during 1963-1967, and that the Texas rules of contractual construction compelled the conclusion that the Adams family did not convey these personal property rights to Schnell. The Schnell group and Phillips argue that the disputed money

cannot represent a personalty interest founded on a debt because this purported debt did not become due and payable until after the FPC order, that is, long after the Adams family had conveyed its interest in the leasehold estate to Schnell.

Although there are no Texas cases (nor cases from any other jurisdiction) which have dealt with the problem of suspense money not currently due and payable, common sense and elemental fairness can lead only to the conclusion that the Adams family had a right to payment *in full* for the gas they sold to Phillips, and that they have at no time reliquished their right to complete compensation. The Texas law, as set out above, dictates a like result. In East Texas Refining Co. v. Helvir Oil Co., *supra,* for example an assignor of an oil and gas lease quarreled with the assignee over the right to payments for oil which had already been produced and sold to a third party at the time the assignment was made. The language of the instrument there was similar to that of the assignment here, and the Texas court held that the assignor had not conveyed its right to payment:

> If we give to the lease contract the construction most favorable to [the assignee's] contention, it transfers to [the assignee] [the assignor's] interest in the lease and all property incident to such lease. These prior oil runs had been taken from the lease and sold and delivered to [a third party] and were not, on [the date of the assignment] connected with or incident to the lease, and could not be transferred to [the assignee] by a mere transfer of such lease.

82 S.W.2d 392, 395.[11]

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[11] We note that the Texas state tax on the production of oil, a tax payable by the producer of the oil, accrues when the oil is produced—and not when it is paid for. Tex. Tax.-Gen. art. 4.01 et seq., V.A.T.S.; State v. Humphrey, Tex.Civ.App. 1942, 159 S.W.2d 162; *see also* Alexander v. Texaco, Inc., 5 Cir. 1973, 482 F.2d 1248; Fain-McGaha Oil Corp. v. Murko Oil & Royalty Co., 1937, 128 Tex. 646, 101 S.W.2d 547.

We do not believe that our case should be decided differently from *East Texas Refining* simply because the assignor there had a right to payment in full by the time of the assignment, while the Adams family could not know the extent of its earnings until several years after the assignment to Schnell. The Adamses owned the gas in place at the time of extraction, at which point they exchanged their right to the gas for the right to be paid therefor. The fact that the debt was not liquidated on the date of assignment, and could not be ascertained for some time thereafter, does not make it any less a personal property right. The Adams family did not convey this right to Schnell, and they are entitled to the suspense money now in the registry of the district court.[12]

[12] The Schnell group argues, in face of the rule of construction of unambiguous contracts, that the Adams family intended to convey their right to the suspense money. We believe that the evidence offers no support for this contention, and that the best evidence of the Adams family's intentions is the assignment itself, which makes no mention of the suspense money; that document compels the legal conclusion that the Adams family retained their right to the disputed funds.

Finally, Phillips argues that "public policy imperatives" require that the disputed funds go to the Schnell group, for the reason that "the practical effect of the decision of the trial court . . . will be to create more problems than it solves. Courts exist to resolve, not create, problems; consequently this portion of the decision is contrary to public policy." This interesting argument is founded on the consideration that if we were to decide that the Schnell group should have the suspense money, all Phillips would have to do in order to fulfill its obligations with respect to its 900-odd percentage-of-proceeds contracts would be to determine who held the mineral leasehold interests on October 28, 1972 (the last date for appeal from the Ninth Circuit's affirmance of the FPC's *Hugoton-Andarko* order—the date on which Phillips believes its various debts became due and payable), and then to pay those parties. A decision that the Adams family holds title to the funds as personal property, however, would expose Phillips to

(Continued on next page)

III

With respect to interest, the district court found that Phillips could not safely disburse the suspense money until October 28, 1972, the date on which the FPC's *Hugoton-Andarko* order became immune from further legal attack, and that from that time until December 21, 1973, the date on which Phillips paid the disputed funds into court, Phillips was a stakeholder faced with conflicting claims to a single fund. These circumstances, coupled with the failure of the Adams family to demand that Phillips pay the money into court, convinced the district court that neither equity nor Texas law supported an award of interest from Phillips to the Adams family based on the principal sum of the suspense money.[13] We believe that the district court erred in its construction of the law of Texas with regard to the award of interest, and we conclude that Texas law permits—and equity requires—the award of interest to the Adams family at Phillips' expense.

The Adams family predicates its prayer for interest upon the fact that Phillips had the use of the suspense money from 1963 until it paid the money into court in late 1973. They reason that if they have title to the principal

the travails of determining the owners of property which can be transferred without entry upon the public records. Phillips also offers the observation that since federal regulation of the natural gas industry is to blame for this mess in the first place, the federal courts ought not compound the confusion by forcing Phillips to pay debts where there may be conflicting claims to the suspense money. This case indicates that Phillips is well aware of the availability of interpleader actions in the federal and state courts, and neither of the arguments advanced above seems to us to warrant the alteration of the Texas law of contract and property.

[13] A full elucidation of the district court's resolution of the interest question may be found in its subsequent opinion in Phillips Petroleum Co. v. Riverview Gas Compression Co., D.C. Tex., 372 F.Supp. 282, 285-86.

sum of the suspense money, then they ought also to have the income which those funds generated while sitting in Phillips' general account. Phillips rejoins that the Texas statute governing the award of interest forbids such an award on a principal sum before that sum becomes due and payable, which in this case did not occur until October 28, 1972, and that the principal sum here has been the object of litigation since that date, so that no interest may be taxed against Phillips for any part of the ten-year period in which it used the funds for general corporate purposes.

Since the award of interest is in derogation of the common law, it is ordinarily the case that interest should be refused except in such cases as come within the terms of enabling legislation. Watkins v. Junker, 1897, 90 Tex. 584, 40 S.W. 11; Kirkpatrick v. Great American Ins. Co., Tex.Civ.App. 1927, 299 S.W. 943, no writ. The Texas interest statute defines "interest" as "the compensation allowed by law for the use or forbearance or detention of money," and defines "legal interest" as "that interest which is allowed by law when [as here] the parties to a contract have not agreed on any particular rate of interest." Vernon's Ann.Tex.Rev.Civ.Stat. art. 5069-1.01. The legal rate of interest in Texas is six percent per annum, "on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable . . . ." Tex.Rev.Civ.Stat. art. 5069-1.03.

Phillips has done the Adams family no wrong, so that the Adamses cannot claim interest as an item of damages, nor does this case fall within the statutory rubric of "forebearance or detention" of money. Consequently, the Adams family can claim interest from Phillips only as "compensation allowed by law for the use . . . of money." *See* Kishi v. Humble Oil & Refining Co., 5 Cir. 1926, 10 F.2d 356; Walter E. Heller & Co. v. Barnes, Tex.Civ.App.

1967, 412 S.W.2d 747, writ ref'd n.r.e.; Sherrill v. Phillips, Tex.Civ.App. 1966, 405 S.W.2d 627, writ ref'd n.r.e. The apparent difficulty with such a theory of recovery is that the statute seems to allow interest only on "written contracts ascertaining the sum payable, from and after the time when the sum is due and payable," while the principal sum here was neither ascertainable nor due and payable until after the FPC order became final, long after the suspense money began to accumulate. The Texas courts, however, have interpreted the interest statute in a liberal manner, so as to do substantial justice. For example, although the statute seems on its face to require a liquidated amount due on a definite date, if interest is to be awarded, the statute has been construed to allow interest if the amount of recovery depends on conditions existing at the due date, even though the amount may be unascertained and disputed until the conclusion of the trial. Evans Production Co. v. Shaw, 5 Cir. 1960, 276 F.2d 313, reh. den., 5 Cir., 277 F.2d 927, cert. denied, 364 U.S. 819, 81 S.Ct. 54, 5 L.Ed. 2d 50; Texas Co. v. State, 1955, 154 Tex. 494, 281 S.W.2d 83; Johnson v. Downing & Wooten Const. Co., Tex. Civ. App. 1972, 480 S.W.2d 254, no writ. Moreover, although Texas courts have been more strict in refusing interest for periods prior to the time when an obligation becomes due and payable, *see, e.g.,* Hayek v. Western Steel Co., Tex. 1972, 478 S.W.2d 786; G & W Marine, Inc. v. Morris, Tex. Civ.App. 1971, 471 S.W.2d 644, at least one Texas court has awarded interest in a contract case for a period prior to the due date of the debt, apparently for equitable reasons. Treon v. Richter, Tex.Civ.App. 1954, 265 S.W.2d 125, writ ref'd n.r.e.

A reading of all the relevant Texas cases convinces us that interest is awarded or refused in that jurisdiction only after a careful consideration of all the circumstances in the particular case, and that the Texas interest statute

is sufficiently flexible to permit the courts to do equity.[14] Our belief is strengthened by the knowledge that this Court has consistently awarded or approved the award of interest in cases applying Texas law.[15] *See, e.g.,* Sid Richardson Carbon & Gasoline Co. v. Phillips Petroleum Co., 5 Cir. 1972, 456 F.2d 203; Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir. 1970, 429 F.2d 1033; Colonial Refrigerated Transportation, Inc. v. Mitchell, 5 Cir. 1968, 403 F.2d 541; Evans Production Co. v. Shaw, *supra;* Natural Gas Pipeline Co. v. Harrington, 5 Cir. 1957, 246 F.2d 915, cert. denied, 356 U.S. 957, 78 S.Ct. 992, 2 L.Ed.2d 1065; H. B. Zachry Co. v. Terry, 5 Cir. 1952, 195 F.2d 185, cert. denied, 344 U.S. 819, 73 S.Ct. 14, 97 L.Ed. 637; Phillips Petroleum Co. v. Williams, 5 Cir. 1947, 158 F.2d 723; Kishi

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[14] Cases in which Texas courts have awarded interest in apparent contravention of the literal meaning of the statute's "ascertainability" and "due and payable" requirements include: Davidson v. Clearman, Tex. 1965, 391 S.W.2d 48; Watgins v. Junker, *supra*; Hayek v. Western Steel Co., *supra;* Beck v. Lawler, Tex.Civ.App. 1968, 422 S.W.2d 816, writ ref'd n.r.e.; Haggar Co. v. Rutkiewicz, Tex.Civ.App. 1966, 405 S.W.2d 462, writ ref'd n.r.e.; DeLeon v. Aldrete, Tex.Civ.App. 1965, 398 S.W.2d 160, writ ref'd n.r.e.; City of Corpus Christi v. Drought, Tex.Civ.App. 1964, 380 S.W.2d 645, writ ref'd n.r.e.; City of El Paso v. Nicholson, Tex.Civ.App. 1962, 361 S.W.2d 415, writ ref'd n.r.e.; Arcadia Refining Co. v. Cook, Tex.Civ.App. 1940, 146 S.W.2d 767, writ dism'd jdgmt. cor.

Cases in which Texas courts have strictly construed the interest statute so as to deny interest include: Cox v. Davidson, Tex. 1965, 397 S.W.2d 200; Zummo Cattle Co. v. Millard, Tex.Civ.App. 1972, 482 S.W.2d 17, writ ref'd n.r.e.; Ryan v. Thurmond, Tex.Civ.App. 1972, 481 S.W.2d 199, writ ref'd n.r.e.; Winandy Greenhouse Construction, Inc. v. Graham Wholesale Floral, Inc., Tex.Civ.App. 1970, 456 S.W.2d 470, no writ; Hull v. Freedman, Tex.Civ.App. 1964, 383 S.W.2d 236, writ ref'd n.r.e.

[15] Two exceptions to this general trend, Gulf Oil Corp. v. Olivier, 5 Cir. 1969, 412 F.2d 938; and Atwood v. Humble Oil & Refining Co., 5 Cir. 1964, 338 F.2d 502, cert. denied, 1965, 381 U.S. 926, 85 S.Ct. 1562, 14 L.Ed.2d 684, are discussed *infra.*

v. Humble Oil & Refining Co., *supra;* Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Co., *supra.*

Since we have concluded that the Texas statute does not preclude the award of interest to the Adams family, we now turn to the more difficult problem of whether interest ought to be awarded in the context of the facts in the case at bar. In this case, Phillips collected money over a period of several years which would ultimately be refunded to its customers or paid to its suppliers; in no event did Phillips ever have the slightest prospect of entitlement to the entire principal sum of suspense money here in question. This money was not placed in an escrow account, nor was it paid to the suppliers as it accumulated, subject to refund, with interest—a course of action followed by Phillips in other instances. *See* n.10, *supra.* Instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at seven percent interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillips' contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction.[16]

Texas jurisprudence is relatively unencumbered by decisions expressly invoking the equitable doctrine of unjust

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[16] Phillips suggests that the income from the suspense money is really a sort of compensation incorporated *sub silentio* into each percentage-of-proceeds production contract, for its efforts in making blanket contract rate filings with the FPC pursuant to 18 C.F.R. § 154.91(e), thus enabling the small producers to obtain a "coattailing" benefit and avoid FPC filing expenses. The problem with this theory is that section 154.91(e) *requires* Phillips to make these blanket filings, and it would be somewhat strange for a producer to pay Phillips for performing the pipeline company's own regulatory obligations.

enrichment,[17] but many of the interest decisions already mentioned indicate some concern that the party against whom interest is awarded should not profit from its possession of the principal sum in question. One such case is that of City of El Paso v. Nicholson, Tex.Civ.App. 1962, 361 S.W.2d 415, writ ref'd n.r.e., where money belonging to the plaintiff was wrongfully seized by El Paso police, placed in the municipal treasury, and used for general City purposes. The *Nicholson* court awarded interest to the plaintiff for the time his money had been ensconced in the City treasury, "not as a punitive measure, but merely because the City had the use of this sum of money . . ." 361 S.W.2d 415, 418.

We find a similar, and more venerable, precedent in Kishi v. Humble Oil & Refining Co., 5 Cir. 1926, 10 F.2d 356. In *Kishi,* rival oil companies were producing oil from the same southeast Texas property under conflicting leases. In a commendable spirit of cooperation, each group of claimants agreed that the other group could continue production on the property, pending judicial resolution of the title dispute, at which time the losing oil company would refund its profits to the winning group. This court settled the title difficulty, and the losers paid the agreed principal sum to the winners; the latter then asked for interest on the principal for the period of four years in which the rival oil company held money which was eventually determined not to belong to them. We awarded interest to the successful claimants, at the Texas statutory rate, even assuming that the losing oil company was a stakeholder, on the ground that the oil company:

> had the use of the money, because [it] kept it, and therefore ought to pay interest as an incident to the

[17] The case of Le Cuno Oil Co. v. Smith, Tex.Civ.App. 1957, 306 S.W.2d 190, writ ref'd n.r.e., cert. denied, 1958, 356 U.S. 974, 78 S.Ct. 1137, 2 L.Ed.2d 1147, is a classic unjust enrichment case, although the court preferred to use the terminology of "windfall or excessive allowance."

> principal debt. If [the oil company] had not wished to use the money, and thus be liable for interest, [it] could have deposited [the money] in the registry of the court. A stakeholder who retains money is liable for interest.

10 F.2d 356, 357.

Finally, in Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Co., S.D. Tex. 1960, 201 F.Supp. 679, aff'd sub nom. Socony Mobil Oil Co., v. Brooklyn Union Gas Co., 5 Cir. 1962, 299 F.2d 692, cert. denied, 371 U.S. 887, 83 S.Ct. 182, 9 L.Ed.2d 121, distributors of natural gas had overpaid a pipeline company, which overpayments were the result of excessive rates demanded of the pipeline company by certain major producers of gas. The distributors demanded that the producers refund the excess charges, with interest. After careful consideration, the district court awarded, and we approved, an award both of principal and interest to the distributors. With regard to interest, the district court reasoned that the producers:

> have had the use of this money from the date of its receipt. Similarly, [the distributors] have been deprived of the use of such funds from the time these increase rates were reflected in [the pipeline company's] charges to them. Equitable considerations compel the conclusion that interest should commence from the respective dates of [the pipeline company's] overpayments to [the producers].

201 F.Supp. 679, 682-83.

One might object that these three cases are inapposite here, as the prevailing parties in *Nicholson, Kishi,* and *Brooklyn Union Gas* all were eventually found to have the sole title to and right to possession of the disputed principal sums during the entire time for which interest was to be awarded. In this case, on the other hand, we have already recognized that the Adams family had no right, con-

tractual or otherwise, to possession of the corpus of the suspense money in the years before the FPC order, so that they could in no circumstances have enjoyed any income from the money in the absence of Phillips' collection and utilization thereof. This is precisely the basis for the general rule that interest is not allowable on a principal sum until that sum is due and payable, that is, until another party has a present right to the money, the deprivation of which denies that person the opportunity to invest the principal and earn money therewith.

However, this case presents a factual situation to which there are no close parallels in the Texas case law. We must decide whether it is better that one party (Phillips) should have the right to the possession of the principal sum, but not to the income, and that another party (the Adams family) should have the right to the income even though it had no right to posession of the principal during the accumulation of the income, *or* that a party (Phillips) which at no time had any claim to ownership of the principal sum should enjoy the income therefrom. We believe that the former rule is the more equitable one, not because Phillips has done anything wrong, but because Phillips ought not to be able to use someone else's money as it pleased for ten years, thereby enjoying a very considerable benefit, and then pay nothing for the use of the money. The *Nicholson, Kishi* and *Brooklyn Union Gas* cases illustrate the elemental equitable principle upon which we base our award of interest to the Adams family.

The district court's opinion in the companion case of Phillips Petroleum Co. v. Riverview Gas Compression Co., *supra,* held that this Court's decisions in Atwood v. Humble Oil & Refining Co., 5 Cir. 1964, 338 F.2d 502, and Gulf Oil Corp. v. Olivier, 5 Cir. 1969, 412 F.2d 938, forbade the award of interest to the Adams family at Phillips' expense. We believe that the able district judge misapprehended those two cases, and that neither case sets out a rule in conflict

with the one we adopt here. *Atwood* was the culmination of a 20-year legal battle between Humble Oil and the owners of the vast King Ranch in south Texas over the interpretation of a mineral lease. Of particular importance to the determination of the interest question was the fact that Humble had repeatedly attempted to pay the owners the principal amount on which they were now demanding interest, but the owners had refused to accept the proffered payments. By making these spurned tenders, Humble had effectively deprived itself of the dominion over the money which is basic to any award of interest against a holder of funds. This court's refusal to award interest in *Atwood* was based on equitable considerations not unlike the ones which motivate our decision today, and that decision is certainly not a bar to the result here. *Olivier* was another case which concluded a long wrangle over mineral rights, this time in Louisiana. Humble Oil had withheld certain overriding royalty payments from 1959 until our resolution of the dispute in 1969, and the individuals whom we adjudged to be entitled to the royalties demanded that Humble pay them interest for this period. We refused their request, since "Humble could not safely make the payments until the title question had been adjudicated." 412 F.2d 928, 946. Although *Olivier* would seem to be analogous to this case, the fact of the matter is that Humble had been paying the disputed royalties into the registry of the district court since 1962, *see* Olivier v. Humble Oil & Refining Co., E.D.La. 1963, 225 F.Supp. 536, 539; Cutrer v. Humble Oil & Refining Co., E.D.La. 1962, 202 F.Supp. 568, 574, so that interest obviously could not be taxed against the oil company for that period. Furthermore, the genesis of the litigation, as in Kishi v. Humble Oil & Refining Co., *supra,* was a dispute between rival claimants to mineral rights in property from which Humble and Gulf Oil were removing oil. Since *Kishi,* many oil companies had solved the financial problems posed for them by that decision by inserting clauses into oil and gas leases providing that in

the event of any dispute over title to the mineral interest in the subject property, the oil company concerned could withhold all payments, with no liability for interest thereon, until the dispute was resolved. The *Olivier* lease contained such a clause. *See* Cutrer v. Humble Oil & Refining Co., E.D.La. 1961, 192 F.Supp. 757, 758, so that whatever the equitable considerations may have been in that case, we could not have awarded interest in the face of the contractual prohibition thereof. *Olivier* in no way conflicts with our decision here.

The district court was also convinced that Phillips should not have to pay interest in view of its position as a stakeholder. We have already demonstrated that *Atwood* and *Olivier* offer no support for such a proposition. The general rule, moreover, is that the mere fact that an individual may be a stakeholder in no way immunizes him from the obligation to pay interest if he makes use of the money while it is in his possession, for the reason that a contrary rule would permit a person with no claim to a sum of money to enjoy a greater benefit from its possession than a person who makes such a claim, when that claim is later adjudged inferior to that of another person. *See* New York Life Ins. Co. v. Lee, 9 Cir. 1956, 232 F.2d 811; Great Lakes Transit Co. v. Marceau, 2 Cir. 1946, 154 F.2d 623; Massachusetts Mut. Life Ins. Co. v. Central Penn National Bank, E.D.Pa. 1973, 372 F.Supp. 1027; John Hancock Mut. Life Ins. Co. v. Doran, S.D.N.Y. 1956, 138 F. Supp. 47. The district court was of the opinion that Bergendahl v. Blanco Oil Co., Tex.Civ.App. 1969, 440 S.W. 2d 81, writ ref'd n.r.e., indicated that the Texas rule is to the contrary, but the Texas court's ruling that "the [stakeholders] were not obligated to invest [the] funds," 440 S.W.2d 81, 85, infers that the *Bergendahl* stakeholders did not use the money they held, so that an award of interest would certainly have been improper. We do not believe that the Texas law in this area is different from that in other jurisdictions, *but see* Allied Building Credits, Inc. v.

Grogan Builder Supply Co., Tex.Civ.App. 1963, 365 S.W. 2d 692, writ ref'd n.r.e., and we conclude that Phillips is liable for interest for the period in which it enjoyed a reasonably free use of the money, that is, from the time Phillips collected the suspense money until the day it tendered or paid the funds into the registry of the district court.

Phillips raises a contractual defense to liability for interest, on the basis of warranty clauses contained in its casinghead gas contracts with the Adams family, in which the latter group warranted title to the gas, and agreed that if their "title is questioned, or involved in litigation, [Phillips] shall have the right to withhold payment without interest during the pendency of such litigation, or until said title is freed from such question . . ." Phillips argues that whatever the equities of the situation may be, the Adams family waived any possible right to interest in its contracts with Phillips. The problem with this argument is that the warranty clauses, which are similar to that involved in *Olivier,* apply only to the title to the gas which Phillips purchased from the Adams family during 1963-1967. There has never been any question, however, that the Adams family had full title to the gas at the time of the sales to Phillips, and it is clear that they in no way breached their warranty agreement; the instant litigation stems instead from a disagreement as to which party should receive a partial payment for that gas. While Phillips may protest that this is too nice a distinction, it is precisely the one which the contract itself requires; Phillips has no contractual defense to the payment of interest.

Phillips also urges that if it is to be charged with interest, we should not extend its liability beyond April 6, 1973, the date on which Phillips filed its complaint in interpleader and offered to pay the suspense money into court. Phillips did make an unconditional offer to relinquish possession of the money when it filed the complaint, but the Adams family failed to respond to the tender, so that Phillips finally paid the money into court on its own mo-

tion, on December 21, 1973. Once a stakeholder makes an unconditional offer to give up possession of a disputed fund, it ceases to exert that dominion over the money sufficient to justify an obligation to pay interest thereon, and the rule is that once such an unconditional tender is made, any liability for interest ceases as of the date of tender. Smith v. Transit Casualty Co., E.D.Tex. 1968, 281 F.Supp. 661, aff'd, 5 Cir. 410 F.2d 210; Carer v. Barclay, Tex.Civ. App. 1972, 476 S.W.2d 909, no writ; *cf.* Wm. A. Smith Contracting Co. v. West Central Texas Municipal Water Dist., 5 Cir. 1965, 344 F.2d 470. It follows that Phillips is not liable for interest beyond April 5, 1973.

Since there was no evidence presented below on the question of the proper amount of interest to be awarded to the Adams family, we remand this case to the district court for further proceedings not inconsistent with this opinion. The reasoning of our decision would ordinarily require that the Adams family receive interest at the statutory rate on the suspense money as it was collected during 1963-1967, and on the entire principal sum from June 30, 1967, until April 6, 1973. At trial, however, the Adams family asked for interest only from October 1, 1970, the date of the FPC's *Hugoton-Andarko* order, so their recovery must be limited to that amount.

IV

In summary, we affirm the judgment of the district court with respect to the entitlement to the principal sum of the suspense money. Texas law requires specificity in conveyances of personal property in order to place an opaque curtain between the interests passed and those retained; after the curtain falls, only those things not explicitly transferred remain on the assignor's side of the stage. Texas jurisprudence clearly provides that the Adams family's right to payment for gas already produced is a personal right, and that right was not specifically mentioned in the instrument of assignment, so it follows that

the Adams family did not convey their right to payment to Schnell, and they are now entitled to receive the disputed suspense money. We also conclude that Phillips must pay interest on the principal sum of the suspense money, and we accordingly reverse the judgment of district court on this point. Texas courts do not insist on statutory rigidity in the allowance of interest, for they realize that the right to interest is a marketplace concept, and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it.

Affirmed in part; reversed in part and remanded.

(Caption Omitted in Printing)

Petition for Rehearing of Phillips Petroleum Company and Request for Rehearing En Banc

COMES Now the plaintiff-appellee, Phillips Petroleum Company [PHILLIPS], and respectfully prays this Court to grant a rehearing and that said rehearing be en banc.

This Court, by its opinion entered on May 22, 1975, has affirmed in part and reversed in part the decision of The Honorable Halbert O. Woodward that the assignor-claimants [THE ADAMS FAMILY], who held the leasehold interest from 1963-1967 at the time the debt owed by PHILLIPS under the percentage-of-proceeds contract for

sale of casinghead gas became due and payable, were entitled under Texas law, to receive the supplier's share of "suspense money," collected by PHILLIPS during the pendency of rate-increase applications which became payable when the Federal Power Commission [FPC] approved said increases as part of the Hugoton-Anadarko Rate Case [FPC Opinion 586]; and held further that PHILLIPS was for interest prior to October 28, 1972.

PHILLIPS' Request for Rehearing should be granted for the following reasons:

1. This Court erred in its application of the Texas law of property and contract interpretation in confirming title to the suspense money so-called;

2. This Court has failed to follow the clear language of TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 and 5069-1.03, and the Texas case law in ruling that interest should be awarded for that period *prior to the time the principal sum became due and payable;*

3. In deciding that under the factual situation present here, equity compels that interest be awarded, this Court disregarded undisputed factual evidence and contract provisions and deprives PHILLIPS of its property without due process;

4. The Trial Court was, and this Court is, *without jurisdiction* to entertain the counterclaim for interest, or to award interest, in this interpleader action, where PHILLIPS did not, and does not, claim title to the interpleaded fund; and

5. Finally, this Court errs when it repeatedly calls PHILLIPS a "pipeline company", and this prejudicial characterization should be corrected.

The rehearing requested by PHILLIPS should be heard en banc for the following reasons:

1. This proceeding involves questions of first impression and of exceptional importance, both with regard to the law of title and to the law on interest,

and a consideration en banc is necessary to rectify the erroneous decision of this Court on both these issues;

2. Consideration en banc also is necessary to secure uniformity of this Court's decisions with regard to the law in Texas, both statutory and decisional, in that notwithstanding the Rules of Decision Act, 28 U.S.C. § 1652 (1966) and *Erie R. R.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court has failed, refused and neglected to follow the mandate of the Texas Legislature and the courts of the State of Texas in ruling that interest may be awarded prior to a time when an obligation becomes due and payable;

3. Consideration en banc is necessary to maintain a uniformity of this Court's decisions, in that this decision is in direct conflict with all of this Court's *prior decisions* that hold that interest is calculated only from the date the principal sum is due and payable, and not before; and for the further reason that the award of interest in this case is in direct conflict with the constitutional law pronouncement in *Boutte, et al.* v. *Chevron Oil Company,* 316 F. Supp. 524 (E. D. La. 1970), *affirmed per curiam,* 442 F. 2d 1337 (1971), in that the decision here obliging PHILLIPS to pay interest on money held by it subject to possible refund to pipeline companies for the period prior to the time the FPC has established a just and reasonable rate *deprives* PHILLIPS *of its property without due process,* contrary to what was said in the *Boutte* case; and

4. Finally, consideration en banc is necessary to secure a uniformity of decisions among the Circuits with regard to whether or not the Court has *jurisdiction* to entertain a counterclaim for interest in an interpleader action, where the interpleader party does not assert a claim against the fund, the United States Court of Appeals for the Fourth and Tenth Circuits having ruled heretofore that no such jurisdiction exists.

The Title Issue

PHILLIPS adopts the argument appearing in the Petition For Rehearing filed by the SCHNELL GROUP.

Texas Statutory Law Precludes Interest Here

Here, it is stipulated that the suspense money so-called did not become *due and payable* until October 28, 1972 (PTO, Adms. 23, 24, 26, at App. 13-14). This Court erred when it held that "the Texas statute does not preclude the award of interest to the Adams family" for the period prior to that date.

As this Court correctly notes, "[s]ince the award of interest is in derogation of the common law, it is ordinarily the case that *interest should be refused except in those cases as come without the terms of the enabling legislation.*" (Slip. Opn. 5643, emphasis added.) Here, the only relevant enabling legislation is found in TEX. REV. CIV. STAT. ANN. art. 5069-1.01 and 1.03 (1967), which says in pertinent part that " '[i]nterest' is the compensation allowed by law for the use or forbearance or detention of money; . . . ." (art. 5069-1.01(a)), and further that "[w]hen no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable *from and after the time when the sum is due and payable;* . . . ." (art. 5069-1.03, emphasis added). This Court errs when it says that the courts of Texas have construed this statute in a fashion which would allow interest "for the use of money" for a period of time *prior* to the time when the principal sum becomes due and payable.

Counsel for PHILLIPS have diligently reviewed all of the Texas decisions cited by this Court (including this Court's own decisions), and nowhere in these cases can counsel find a single instance where interest on the principal sum

is awarded for a period of time prior to said sum becoming *due and payable.* Thus, we are unable to understand this Court's statement, in footnote 14, that one or more of the cases cited there support the proposition that there are "[c]ases in which Texas courts have awarded interest in apparent contravention of the statute's [art. 5069-1.03] . . . due and payable requirement . . . ." This simply is not correct.[1]

The case of *Treon* v. *Richter,* 265 S.W.2d 125, 126 (Tex. Civ. App.—San Antonio 1954, *writ ref'd n.r.e.*) does not support the proposition that interest under art. 5069-1.03 can be awarded for a period prior to the time the principal sum becomes due and payable. In the first place, the *Treon* case dealt with an interpretation of "due and payable" under the provisions of the Agricultural Protective Act, TEX. REV. CIV. STAT. ANN. art. 1287-1, et seq., and held by implication that the 30-day payment delay provision in art. 1287-3, sec. 11, provided only that, while a payment *may* be delayed, the due date for interest was the date at which the crop is delivered. Secondly, the four cases cited in the *Treon* case *all* deal with interest *awarded as damages.* Here, we are not concened with interest as damages. Lastly, and most importantly, in *Hayek* v. *Western Steel Co., Inc.,* 478 S.W.2d 786, 795-796 (Tex. 1972), the Texas Supreme Court ruled on a 30-day payment delay provision found in TEX. REV. CIV. STAT. ANN. art. 5469 and held that interest runs only from and after the 30-day statutory delay period. Hence, if *Treon* still be the law with regard to the 30-day provision of the Agricultural Protective Act,

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[1] There are some cases in Texas with which some might quarrel about whether the sum payable was actually *ascertainable* on the due date. However, a close reading of the cases cited by this Court in footnote 14 reveals that what the Texas courts have held was that the sums were *in fact ascertainable.* Thus, the courts do not contravene (apparently or otherwise) the literate meaning of the statute with regard to restricting interest only to such sums as are *ascertainable.*

its viability is strictly limited to art. 1287-3, sec. 11, of that Act.

The case of *G. & W. Marine, Inc.* v. *Morris,* 471 S.W.2d 644, 649 (Tex. Civ. App.—Beaumont 1971, *writ ref'd n.r.e.*), cited by this Court (Slip Opn. 5643) [2] dealt specifically with the question of interest under the provisions of TEX. REV. CIV. STAT. ANN. art. 5069-1.03. In *Morris,* the Court made it unequivocally plain that there can be no interest awarded for the period prior to the time the principal sum is payable, saying:

> "• • • [P]laintiff should have recovered interest . . . from the date the sum became *due and payable* . . . . Article 5069-1.03, V.A.C.S., Federal Life Ins. Co. of Chicago v. Kriton, 112 Tex. 532, 249 S.W. 193, 195 (1923)." 471 S.W.2d, at 649, emphasis added.

In *Federal Life Ins. Co. of Chicago* v. *Kriton,* 249 S.W. 193, 195 (Tex. Comm'n App. 1923, *opinion adopted*), the Court, construing art. 4977, [3] held that interest *eo nomine* (i.e., not interest as damages) runs from the time the *liability attaches.* In this case, liability attached on October 28, 1972, and not before.

No Texas cases are found which hold that liability for interest can exist under art. 5069-1.03 (or its predecessor statute) prior to the date the principal sum is due and payable; rather, the Texas cases clearly require that a sum be *due and payable* before interest can run. Thus, in ruling otherwise, this Court has refused to follow the rule of *Erie R. R.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1933), which requires the federal courts in diversity cases to apply state law as pronounced by the

[2] This Court notes, then ignores, the correct statement that Texas courts have been strict in *refusing interest for periods prior to the time when an obligation became due and payable.*

[3] TEX. REV. CIV. STAT. ANN. art. 5069-1.03 is derived from Rev. Civ. St. 1911, Art. 4977. Their language is virtually identical.

state courts.[4] Worse still, this Court has refused to follow the Rules of Decision Act, 28 U.S.C. § 1652 (1966) and give heed to the will of the Texas Legislature as declared in TEX. REV. CIV. STAT. ANN. art 5069-1.03 (1967). This error should be corrected forthwith.

The Equities Do Not Require the Award of Interest

Even if the Texas law did not preclude an award of interest in this case, the equities do not require the award of interest.

This Court ignores and overlooks the fact that the ADAMS FAMILY (assuming *arguendo* they are entitled to the suspense money so-called) received an additional $12,296.81 in compensation under the two casinghead gas contracts, and that they were not required to take any risks, assume any liability, expend any additional money for production, or produce any additional gas to get this money. This significant benefit resulted solely from risks taken and liabilities assumed by PHILLIPS. Here, PHILLIPS sold gas obtained under the above-referenced casinghead gas contracts, and other contracts, subject to the jurisdiction of the FPC, at prices, a portion of which had not been approved by the FPC; and the increased sales prices of the gas were collected by PHILLIPS subject to a duty to refund the same with interest to the purchasers pursuant to Section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)(PTO, Adm. 20; at App. 12). It is stipulated that PHILLIPS chose to collect the higher rates subject to refund because increases in gas sales prices cannot be made retroactive; thus, if PHILLIPS *had not collected the higher rates subject to*

[4] While the courts of Texas well may interpret the relevant interest statute in a liberal manner, so as to do substantial justice, they do not refuse to give due heed to the limits of interpretation contained in the unequivocally clear language of the statute which says that interest shall be allowed only "*from and after the time the sum is due and payable.*" (art. 5069-1.03, emphasis added.)

refund, the owners of the casinghead gas contract rights could not receive, as part payment due them under said contracts, a sum computed in relation to the higher price for which PHILLIPS *sold gas* (PTO, Adm. 21, at App. 12-13).

While PHILLIPS could have elected not to put up a corporate undertaking, and not made collections subject to possible refunds pursuant to Section 4(e) of the Natural Gas Act, this would have precluded PHILLIPS from ever receiving an increase until the Hugoton-Anadarko Rate proceedings were finalized on October 28, 1972. But PHILLIPS did incur the risk of having to refund the entire sums plus a heavy penalty of interest (PTO, Adms. 20, 21, 22, at App. 12-13). By doing so, PHILLIPS ultimately gained the advantage of retaining part of the total money when the FPC approved the rate increases in part. PHILLIPS' decision to take the risk also benefited the ADAMS FAMILY. After the FPC decision was final, PHILLIPS was able to pay to the ADAMS FAMILY (subject to the adverse title claim), an additional $12,296.81 (PTO, Adm. 26, at App. 14).

At no time while PHILLIPS *was collecting money subject to possible refund with interest was the* ADAMS FAMILY *exposed to any risk at all. The risk to* PHILLIPS, *however, was significant.* Since most of the rate increase dockets (31 in all) were filed in the late 1950's and early 1960's (see Add. 5 and Add. 6 in PHILLIPS' Brief in 74-2009), and the FPC rate proceeding moved with great deliberateness to the 1970's, it can be seen that PHILLIPS' interest expense alone on any refund potentially could be 70 to 98 percent of any part of the rate increase the FPC did not approve. *By reason of this risk, and to offset the seven percent interest paid by* PHILLIPS *to the pipeline companies on the monies refundable under FPC Opinion 586,* PHILLIPS *rightfully ought to be able to retain any income earned on the money collected subject to refund.* Thus, this Court erred when it suggests that PHILLIPS unjustly enriched itself with the income from the suspense money so-called.

This is not a case where the doctrine of unjust enrichment may be invoked. PHILLIPS has done nothing unlawful. There is no wrong or injustice here for which the law requires redress under its rules. At best, the Court bases its statement that "equity requires—the award of interest (Slip Opn. 5642) on some philosophical duty (Slip Opn. 5646), but this is insufficient. See *American University* v. *Forbes,* 183 A. 860, 862 (N. H. 1936); and *Anderson* v. *Anderson,* 123 P. 2d 315, 316-317 (Kan. 1942); and *Northern Natural Gas Company* v. *Grounds,* 292 F. Supp. 619, 685 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds,* 441 F. 2d 704 (10th Cir. 1971).

This Court also falls into factual error and disregards the admissions and stipulations of the parties when it says that to exonerate PHILLIPS from any interest obligation would be to give it an "extracontractual lagniappe." The two gas contracts both provide that the seller's additional compensation under ¶ 7B (App. 38 and 44) is computed by multiplying the gas volume delivered times the average price of gas *received by* PHILLIPS. PHILLIPS may not have had the slightest prospect of retaining *all* of the sustainable money, but the contract plainly provides that the sustainable money had to be *received by* and *vest in* PHILLIPS before it was disbursed to the owner of contractual right to receive additional payment. See ¶ 8, App. 39 and 45. Thus, PHILLIPS properly claims the income on the money could be used as a multiplication factor to determine what additional money would be owed to the gas supplier.

The Constitutional Question and the Boutte Case

Here, the relevant pricing provisions of the two casinghead gas contracts (¶¶ 7 and 8, App. 38-39 and 44-45) clearly state that the amount to be received by the seller is, in part, a two-thirds share of the amount by which a stated sum is exceeded by the weighted average price (which is defined in terms of the *price received by* PHILLIPS *from the*

sale of gas to others). Thus, the contracts provide that the seller's two-thirds share is carved out of the whole part first received by and fully vested in PHILLIPS as its sole property.

In view of the foregoing, PHILLIPS contends that the decision here ordering PHILLIPS to pay interest is in conflict with the constitutional law pronouncement which appears in *Boutte* v. *Chevron Oil Company,* 316 F. Supp. 524, at 530, ¶ XIII (E.D. La. 1970), *aff'd per curiam,* 442 F. 2d 1337 (5th Cir. 1971), and contends further that the order of this Court which imposes on PHILLIPS the obligation to pay interest on that part of the funds received from the sale of gas which was subject to refund for the period of time before PHILLIPS' refund obligation had been determined finally by an order of the FPC, deprives PHILLIPS of its property (the income on the money held under PHILLIPS' corporate undertaking subject to refund) without due process. U. S. Const., Amends. 5 and 14.

The Jurisdictional Issue

In this interpleader action brought under 28 U.S.C. § 1332(a), PHILLIPS has not, and does not, assert any claim to the interpleaded money; thus, the Trial Court had no jurisdiction to entertain a counterclaim for interest, or grant judgment *in personam* against PHILLIPS as to any subject matter apart from the interpleaded fund. See: *First Nat'l Bank* v. *Johnson County Nat'l Bank & Trust Co.,* 331 F. 2d 325, 328 (10th Cir. 1964); *Preston Corp.* v. *Raese,* 236 F. Supp. 135, 144 (N.D. W. Va. 1964), *aff'd, Kelly* v. *Raese,* 377 F. 2d 263 (4th Cir. 1967), *cert. den.,* 389 U.S. 931, 88 S. Ct. 294, 19 L. Ed. 2d 283; *Erie Bank* v. *United States District Court,* 362 F. 2d 539, 540-541 (10th Cir. 1966); and *Knoll* v. *Socony Mobil Oil Co.,* 369 F. 2d 425, 429 (10th Cir. 1966), *cert. den.,* 368 U.S. 977, 87 S.Ct. 1173, 18 L. Ed. 2d 138. See also, *State Farm Fire & Casualty Co.* v. *Tashire,*

386 U.S. 523, 87 S.Ct. 1199, 17 L.Ed.2d (1967), where Mr. Justice Fortas noted that the interpleaded fund "marks the outer limit of the controversy." 87 S.Ct., at 1205.

Since the Trial Court assumed it had jurisdiction to act (App. 115-116), but did not award interest, its jurisdictional error was harmless; but, now that this Court has deemed interest can and must be awarded, the jurisdictional error in the Trial Court's Conclusions of Law (App. 115-116) must be rectified, and this Court should order the counterclaim of the ADAMS FAMILY be dismissed.

Phillips Is Not a "Pipeline Company"

Finally, even if this Court denies rehearing on all other issues, this Court should eliminate its erroneous, but apparently unintentional, mischaracterization of PHILLIPS as a "pipeline company." PHILLIPS is not a "pipeline company"; rather, under the Natural Gas Act and the FPC regulations promulgated thereunder, PHILLIPS *is* classified as an "independent producer." See: 18 C.F.R. § 154.91(a); PTO, Adm. 19, at App. 11-12; and *Phillips Petroleum Company* v. *Wisconsin,* 346 U.S. 672, at 674-675, 691-692, 698, 74 S.Ct. 794, 98 L.Ed. 1036 (1954). The distinction between "independent producers" and "pipeline companies" has been recognized and preserved throughout the history of the FPC's regulation of "independent producers." See: *Permian Basin Area Rate Case,* 390 U.S. 747, 756 (1968); and *Sunray Mid-Continent Oil Co.* v. *F.P.C.,* 364 U.S. 137, 169 (1960) (dissent of Justice Harlan).[5]

This Court's unintentional mischaracterization of PHILLIPS as a "pipeline company" may have a prejudicial effect upon PHILLIPS in two actions which now are pending,

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[5] This classification has extremely important consequences in terms of the form of regulation exercised by the FPC. Interstate pipeline companies are regulated on an individual company cost-of-service basis as public utilities. PHILLIPS is not.

as well as in future actions.[6] While this Court's mischaracterization of PHILLIPS as a "pipeline company" would not be controlling in other cases, this Court's opinion might be cited in support of arguments made by PHILLIPS' opponents, with possible confusing results. For these reasons, PHILLIPS requests that this Court revise and correct its *original* opinion (and those in the two companion cases) to reflect the true fact that PHILLIPS is an "independent producer" and is not a "pipeline company."[7]

Conclusion

This Court's judgment, as evidenced by the opinion, is erroneous in view of the matters herein set forth. PHILLIPS renews all other issues and errors raised in its briefs and respectfully prays that a rehearing be granted and that the rehearing be en banc.

Respectfully submitted,

/s/ T. L. CUBBAGE, II
P. O. Box 1751
Amarillo, Texas 79105
Attorney for Appellee
Phillips Petroleum Company

(Certificate Omitted in Printing)

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[6] An appeal now is pending in *McCullough Interstate Gas Corp.* v. *F.P.C.*, No. 75-1251 (10th Cir.), which concerns allegations by McCullough that certain of PHILLIPS' gathering activities in Wyoming should be classified as pipeline activities rather than as gathering services. Also, in *Marathon Oil Co.* v. *F.P.C.*, Dockets Nos. CI 74-537, et al. (FPC), some parties argue that gathering lines built by PHILLIPS in Alaska should be classified as jurisdictional pipelines under Section 7 of the Natural Gas Act.

[7] If the mischaracterization was in any way outcome determinative here, then a rehearing by the Court appears to be in order.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

June 18, 1975

To ALL COUNSEL OF RECORD

No. 74-1777—Phillips Petroleum Co. vs. J. H. Adams, Et Al.; Robert O. Schnell, Et Al.; vs. J. H. Adams, Et Al.

Dear Counsel:

This is to advise that an order as to Phillips Petroleum Co., has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Ruples of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

/s/ BARBARA KREI
by Barbara Krei
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

No. CA-2-1377
No. CA-2-1378

FIRST NATIONAL BANK OF BORGER, as Independent Executor of the Estate of A. L. ROBINSON, et al., *Plaintiff*,

v.

PHILLIPS PETROLEUM COMPANY, *Defendant.*

PHILLIPS PETROLEUM COMPANY, *Plaintiff*,

v.

ALSTAR PRODUCTION CORPORATION, *Defendant.*

February 27, 1974

Judgment and Memorandum Opinion

On this the 26th day of February, 1974 came on to be heard the above-entitled and numbered consolidated cause and ther appeared in court Phillips Petroleum Company by its counsel, the defendant in cause number CA-2-1377 and the plaintiff in cause number CA-2-1378, and there also appeared by and through their attorney the plaintiffs in cause number CA-2-1377, The First National Bank of Borger, a corporation, acting as Independent Executor of the Estate of A. L. Robinson, Don Claude Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson, and the Robinsons are also some of the defendants in cause number CA-2-1378, and there also appeared by and through its attorney Alstar Production Corporation, one of the defendants in cause number CA-12-1378, and the parties having announced ready for trial before the court without a jury, and introduced their evidence, and the court having considered the evidence, the entire record in this case, and the briefs and

argument of counsel, has this day filed its Memorandum Opinion which constitutes the court's Findings of Fact and Conclusions of Law, here referred to and incorporated herein for all purposes. It therefore appears that judgment should be entered as follows:

I

That the following parties are hereby ADJUDGED to be entitled to and own and the Clerk of this court shall pay such sum of $76,600.44 to the Robinson Family, jointly, to-wit:

The First National Bank of Borger, a corporation, acting as Independent Executor of the Estate of A. L. Robinson, Don Claude Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson.

II

The counterclaim of the Robinson Family against Phillips Petroleum Company for interest is DENIED.

III

All relief prayed for by any of the parties hereto not granted specifically herein is DENIED.

IV

Costs are assessed against the Robinson Family.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 27th day of February A.D. 1974.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

MEMORANDUM OPINION

On this 26th day of February, 1974 there appeared in open court Phillips Petroleum Company by its counsel, the defendant in cause number CA-2-1377 and the plaintiff in cause number CA-2-1378, and there also appeared by and through their attorney the plaintiffs in cause number CA-2-1377, The First National Bank of Borger, a corporation, acting as Independent Executor of the Estate of A. L. Robinson, Don Claude Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson, hereinafter referred to as "the Robinson Family," and the Robinsons are also some of the defendants in cause number CA-2-1378, and there also appeared by and through its attorney Alstar Production Corporation, hereinafter referred to as "Alstar," one of the defendants in cause number CA-2-1378, and the parties announced ready for trial.

This Memorandum Opinion shall serve as the court's Findings of Fact and Conclusions of Law, the case being tried before the court without a jury, and in addition to this opinion the stipulations and admissions of the parties set forth in the court's Pre-Trial Order dated February 20, 1974 are here adopted as a part of these Findings of Fact. All exhibits attached to the Pre-Trial Order have been admitted into evidence.

The dispute in this cas concerns the production of gas from five leases covering land in Hutchinson County, Texas. The gas in question, as stipulated to by the parties, was actually produced between the dates of May 1, 1956 and the date of January 1, 1965 when the Robinson Family sold the leases in question to Alstar. (Ex. 1 to Pre-Trial Order)

On December 21, 1973 Phillips Petroleum Company deposited in the registry of this court the sum of $76,600.44 which sum of money represents additional moneys for the purchase price of the gas produced and sold between the above dates. At the time of the production of the gas in

question Phillips Petroleum Company had paid the leasehold owners, pursuant to certain casinghead gas purchase contracts, the amount then approved as the correct amount to be paid by the Federal Power Commission. Subsequently, by a decision of the Federal Power Commission, effective October 1, 1970, an increase in the price of the gas produced was allowed for the periods involved in this case. The sum on deposit with the registry of this court represents this allowed increase in price for the gas produced and sold between May 1, 1956 and January 1, 1965, being the date that the Robinson Family sold the leases in question.

The decision of the Federal Power Commission was appealed to the courts, was affirmed, *The People of State of California, et al.,* v. *Federal Power Commission,* 446 F.2d 974 (9th Cir. 1972), and the last date for the application for writ of certiorari by the parties to said case to the Supreme Court of the United States expired on October 28, 1972.

The pleadings in this cause show that Phillips Petroleum Company tendered the money into the court and these pleadings do not reveal that any of the parties ever demanded a deposit of the moneys with the Clerk although Phillips Petroleum Company did deposit same on December 21, 1973 and they now remain on deposit.

Alstar claims that the assignment of the leases to it, the division order signed by the Robinson Family and Alstar on February 17, 1965 do in effect assign not only the oil and gas leases in question in this case even though these funds represent part payment for gas produced and severed from the lands prior to the effective date of the assignment from the Robinson Family to Alstar.

Two other matters remain in dispute; first, that is the claim of the Robinson Family that Phillips Petroleum Company should be required to pay interest on the amount now on deposit with the Clerk of this court from the effective

date of the Federal Power Commission decision on October 1, 1970 until the time that said sum was deposited with the Clerk of this court on December 21, 1973. Secondly, Phillips Petroleum Company, in its prayer for relief, asks for its costs, but did not specifically mention attorney's fees. The Pre-Trial Order enetered in this cause and agreed to by the attorneys for the parties hereto did not mention any claim for attorney's fees for Phillips Petroleum Company. The court will deny recovery of any attorney's fees because Phillips Petroleum Company did not specifically plead for same nor did it indicate a claim for attorney's fees in the proposed pre-trial order submitted to the court. Accordingly when the judgment is entered this plea for attorney's fees will be denied.

Other evidence introduced for consideration by the court indicates and this court finds as a fact that at all material times hereto there has been a bona fide dispute between the Robinson Family and Alstar as to the true ownership of the money now held by the Clerk.

Based on the record in this case, the evidence introduced, the briefs and argument of counsel, the court is of the opinion that the Robinson Family is the rightful owner of the $76,600.44. The money in question is in part payment of gas severed from the leasehold estates and sold therefrom prior to any assignment of the leases by the Robinson Family. The documents assigning such leases pass only the leasehold title and the personal property and equipment used or obtained in connection therewith and located thereon, and none of these documents can be construed to nor do they constitute an assignment of the moneys in question.

Further, as there was a bona fide dispute among the claimants to the money Phillips Petroleum Company was not obligated in any respect for the payment of interest on said money up until December 21, 1973, and when it paid the money into the registry of the court on said date it was relieved from any payment of interest subsequent

thereto. Had the claimants previously made a demand, after the final effective date of the Federal Power Commission's decision, that the money be placed in the registry of the court, and had Phillips Petroleum Company refused to do so within a reasonable time, then the question of interest might be determined differently, but such are not the facts in this case.

Accordingly judgment will be entered distributing the money and awarding the money to the Robinson Family, The First National Bank of Borger, a corporation, acting as Independent Executor of the Estate of A. L. Robinson, Don Claude Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson, jointly.

A judgment will be entered accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 27th day of February A.D. 1974.

/s/ HALBERT O. WOODWARD
Halbert O .Woodward
United States District Judge

TEXT OF STIPULATIONS AND ADMISSIONS OF THE PARTIES, NUMBERS 1-17, INCORPORATED BY REFERENCE INTO THE DISTRICT COURT'S MEMORANDUM OPINION AS FINDINGS OF FACT.

The parties admit the following:

1. That prior to January 1, 1965, at 7:00 A.M. the Robinson Family was the owner of the working interest in various oil and gas leases in and under the following described lands:

(a) North Half of the Southeast Quarter (N/2 of the SE/4) of Section 17, Block Y, M&C Survey, Hutchinson County, Texas;

(b) The Northeast Quarter (NE/4) of Section 128, Block 5, I&GN RR. Co. Survey, Hutchinson County, Texas;

(c) The Southwest Quarter (SW/4) of Section 117, Block 5, I&GN RR. Co. Survey, Carson County, Texas;

(d) The West 89 acres of the North Half of the North Half (W 80 acres of the N/2 of the N/2) of Section 69, Block 46, H&TC Ry. Co. Survey, Hutchinson County, Texas,

hereinafter collectively referred to as the "subject property."

2. That while the Robinson Family owned and operated these leases, they produced casinghead gas which was sold to Phillips under certain casinghead gas purchase agreements more particularly described hereinafter.

3. On or about May 1, 1956, Phillips Petroleum Company, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 192 at page 398 of the Deed Records of Hutchinson County, Texas) with J.A. Robinson, A. L. Robinson, F. E. Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson, sellers, to purchase casinghead gas produced from wells located on the following described land in Hutchinson County, Texas, to wit:

Johnson—NW/4 N/2 of Section 69, Block 46, H&TC Survey. A true copy of said contract is attached hereto and marked Exhibit "B".

4. On or about July 13, 1956, Phillips Petroleum Company, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 192 at page 503 of the Deed Records of Hutchinson County, Texas) with J.A. Robinson, A.L. Robinson, F. E. Robinson, M. N. Robinson, P. R. Robinson, and C. P. Robinson, sellers, to purchase casinghead gas produced

from wells located on the following described land in Hutchinson County, Texas, to wit:

Weatherly "A"—N/2 SE/4 of Section 17, Block Y, M&C Survey

Burnett—NE/4 of Section 128, Block 5, I&GN Survey. A true copy of said contract is attached hereto and marked Exhibit "C".

5. On or about May 18, 1964, Phillips Petroleum Company, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 302 at page 76 of the Deed Records of Hutchinson County, Texas, among other places) with A. L. Robinson, individually and as Trustee for Don Claude Robinson, M. N. Robinson, and C. P. Robinson, sellers, to purchase casinghead gas produced from wells located on the following described land in Hutchinson and Carson Counties, Texas to wit:

Weatherly "A"—N/2 SE/4 of Section 17, Block Y, M & C Survey. Burnett—NE/4 of Section 128, Block 5, I&GN Survey. Burnett "A"—SW/4 of Section 117, Block 5, I&GN Survey.

A true copy of said contract is attached hereto and marked Exhibit "D".

6. In said contracts, the price and definitions provisions are set out in Articles 7 and 8, respectively. The price and definitions vary slightly, but to no degree material to the outcome of this action.

7. That by an instrument entitled Assignment of Oil & Gas Leases, dated January 9, 1965, recorded in Volume 309 at page 289 of the Deed Records of Hutchinson County, Texas, said instrument to be effective as of January 1, 1965, at 7.00 am., a true copy of which is attached hereto as Exhibit "A", the Robinson Family assigned the subject property and certain rights, title, and interests enumerated in the said instrument to ALSTAR.

8. That by various orders issued since the United States Supreme Court, on June 7, 1954, decided *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 346 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1036, and determined that Phillips, as an independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale, was a "natural gas company" within the Natural Gas Act, the Federal Power Commission (FPC) suspended increases in prices for sales of residue gas filed by Phillips and permitted such increases to be collected beginning at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing a corporate undertaking with the FPC to refund all or any portion of such increases which the FPC might not find to have been justified.

9. That subsequent to June 7, 1954, Phillips sold gas obtained under the above-referenced casinghead gas contracts, and other contracts, subject to the jurisdiction of the FPC, at prices, a portion of which had not been approved by the FPC; the increased sales prices of the gas were collected by Phillips subject to a duty to refund the same to the purchasers in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act (15 U.S.C.—717c(e); and until such time as the FPC approved such increased sales prices or a portion of said prices, there was no right in the Robinson Family or Alstar to recover from Phillips any such monies held subject to refund.

10. That Phillips chose to collect the higher rates subject to refund if the rates were not approved because increases in gas sales prices not made effective subjct to FPC approval cannot be made retroactive. If Phillips had not collected the higher rates subject to refund, the owners of the casinghead gas contract rights could not receive, as part payment due them under said contracts, a sum computed in relation to the higher price for which Phillips sold gas within the Panhandle Field of Texas to third parties.

11. That Phillips had applications before the FPC requesting permission to increase the prices for sales of residue gas and such applications, for this area, were consolidated in FPC Dockets AR 64-1, et al.

12. That on September 18, 1970, the FPC issued Opinion 586, Dockets No. AR 64-1, et al., Hugoton-Anadarko Rate Cases, 44 FPC 761, which established sales prices applicable to gas sales and established refund requirements; on July 31, 1972, the Court of Appeals for the Ninth Circuit affirmed the abovesaid Opinion 586 in The People of State of California, et al. v. Federal Power Commission, No. 71-1036, reported at 466 F.2d 974, et seq., and, as of October 28, 1972, no writ of certiorari was filed by any of the parties to said Ninth Circuit action.

13. That after Opinion 586 became final, the monies collected subject to refund could be divided into two classes "sustainable" money and "refundable" money. The "sustainable" monies are those which, according to Opinion 586, represent lawful proceeds from the sales of gas. It is from these lawful proceeds that the parties from which Phillips purchased casinghead gas receive, as their part payment, a sum computed in relation to the price for which Phillips sold gas within the Panhandle Field of Texas to third parties. The "refundable" monies are those which, according to Opinion 586, represent sums in excess of the just and reasonable rates; i.e. the sums in excess of lawful proceeds from the sales of gas.

14. That this action does not involve "firm proceeds"; that is, the proceeds derived from sales of gas within the Panhandle Field of Texas to third parties at prices which were at or below the rate which had already been approved by the FPC. Such firm proceeds were all paid in a timely manner in accordance with paragraph 9 of each of the casinghead gas contracts referred to hereinabove.

15. That on and after October 28, 1972, and under the sales prices approved by the FPC in Opinion 586, a sum of money

equal to the sustainable portion of the money collected subject to refund, attributed to the working interest in the lease (5) covered by the casinghead gas contract referenced hereinabove for the period from May 1, 1956, through January 1, 1965, at 7:00 a.m. and to the gas contracts covering the subject property, that is, $76,600.44 became due and payable to the lawful owner or owners of said monies.

16. That the Robinson Family has not been paid any portion of the above-said $76,600.44 and all parties admit and agree that either the Robinson Family or Alstar is entitled to this sum of money from Phillips.

17. That at the time of the conveyance by the Robinson Family to Alstar Production Corporation on January 9, 1965, Don Claude Robinson was a minor and his property was being administered by A. L. Robinson, as Trustee for Don Claude Robinson. Since that time, and before the filing of these suits herein, Don Claude Robinson has become of legal age, and the trust by which he was the beneficiary has been terminated, and whatever recovery that he may have herein should be covered in his own individual right, rather than by A. L. Robinson, as Trustee for Don Claude Robinson.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2230

FIRST NATIONAL BANK OF BORGER, as Independent Executor of the Estate of A. L. Robinson, ET AL., *Plaintiffs-Appellants,*

v.

PHILLIPS PETROLEUM COMPANY, *Defendant-Appellee.*

PHILLIPS PETROLEUM COMPANY, *Plaintiff,*

v.

ALSTAR PRODUCTION CORPORATION, *Defendant-Appellant,*

v.

FIRST NATIONAL BANK OF BORGER, as Independent Executor of the Estate of A. L. Robinson, ET AL., *Defendants-Appellees.*

Appeals from the United States District Court for the Northern District of Texas

Judgment

(May 22, 1975)

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that Phillips Petroleum Company and Alstar Production Corporation pay to First National Bank of Borger, etc., et al. the costs on appeal to be taxed by the Clerk of this Court.

(Caption Omitted in Printing)

May 22, 1975

Opinion

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

GOLDBERG, *Circuit Judge*:

This case presents questions similar to those involved in Phillips Petroleum Co. v. Adams, 5 Cir. 1975, 513 F.2d 355 [May 22, 1975, No. 74-1777], and Phillips Petroleum Co. v. Riverview Gas Compression Co., 5 Cir. 1975, 513 F.2d 374 [May 22, 1975, No. 74-2009]. Here, as in *Adams,* there is a dispute between assignor-claimants and assignee claimants over entitlement to suspense money constituting partial payment for gas produced under casinghead gas contracts and sold to Phillips Petroleum Company [Phillips]. The district court awarded the principal sum of the suspense money to the assignor-claimants, the Robinson family, and refused to award the Robinsons interest on those funds at Phillips' expense. The assignor-claimants, the assignee-claimants and Phillips all appeal. Since this case is in no way distinguishable from *Adams,* we rely upon the reasoning of that decision to affirm the judgment of the district court with respect to entitlement to the principal sum, and to reverse the lower court's resolution of the interest issue.

On May 1, 1956, July 13, 1956, and May 18, 1964, the Robinson family entered into various contracts with Phillips whereby the Robinsons agreed to sell casinghead gas produced on five leases held by them in Carson and Hutchinson Counties, Texas, for which Phillips agreed to pay a price based on the average price of Panhandle Field gas

obtained by Phillips in sales to third parties. From May 1, 1956, until January 1, 1965, Phillips purchased gas from the Robinson family pursuant to these contracts, making monthly payments based on the "firm proceeds" of its own sales to third parties, and withholding suspense money collected pending the FPC's approval of increased prices charged by Phillips to its customers. On January 9, 1965, the Robinson family assigned their mineral interest in the five leases to Alstar Production Company [Alstar]. In the assignment, the Robinsons agreed to "BARGAIN, SELL, TRANSFER, ASSIGN and CONVEY" their five "oil, gas and mining leases" to Alstar, with the further provisions that:

> The above leases are assigned subject to such valid and subsisting casinghead gas contracts as are currently in force and effect.
>
> To HAVE AND TO HOLD said leases, and all rights thereunder or incident thereto, together with all personal property used or obtained in connection therewith, to [Alstar], its heirs and assigns, forever.
>
> [The Robinsons also convenant that they are] the lawful owners of said leases and rights and interests thereunder and of the personal property thereon, or used in connection therewith, to the extend covered by this assignment; that the [Robinsons] have good right and authority to sell and convey the same, and that the rights, interests and properties are free and clear of liens and encumbrances. . .
>
> Notwithstanding the date of execution hereof, this Assignment is effective January 1, 1965, at 7:00 A.M.

After the FPC issued its order in the Hugoton-Andarko Rate Case, Op: 586, 44 F.P.C. 761, aff'd, 9 Cir. 1972, 466 F.2d 974, both the Robinson family and Alstar demanded that Phillips pay them the $76,600.44 in suspense money now due as partial payment for gas produced on the properties during 1956-1965—the period in which the Robinsons held title to the mineral interests involved. The

Robinsons sought to convince Phillips that their conveyance of the mineral leases to Alstar had not passed the right to the suspense money, if and when it became due and payable, and Alstar argued just as vehemently that the assignment conveyed the Robinson family's contingent rights to Alstar. On March 29, 1973, the Robinsons filed a contract action in federal district court to recover the suspense money now due and payable by Phillips, plus interest. Phillips simultaneously filed a complaint in interpleader in the same court asking the district court to determine its contractual obligations, and offering to pay the disputed funds into court; neither the Robinsons nor Alstar acted upon the pipeline company's tender, and Phillips finally paid the money into court on its own motion, on December 21, 1973.

The assignment here differs from the one involved in *Adams* in that this one contains a "subject to" clause and an habendum ("To Have and To Hold") clause. As Alstar correctly points out, the "subject to" clause merely clarifies the document by showing that the mineral rights passed thereby are burdened with the casinghead gas contracts. The clause conveys no rights that are not conveyed elsewhere in the assignment. *See* 2 H. Williams & C. Meyers, Oil & Gas Law § 340. Although the habendum, or production, clause in an assignment of mineral rights ordinarily sets the term of the lease and requires the lessee to produce oil or gas on the property if he is to continue to enjoy rights thereunder after the expiration of the fixed term, *see* 1 E. Brown, The Law of Oil & Gas Leases § 5.01, this habendum clause simply establishes a perpetual term for the assignment, and requires no production except that, if any, already required by the preceding "subject to" clause and the casinghead gas contracts. This habendum clause also enumerates the interests assigned, but the parties agree that there is no magic in the words "to have and to hold" in this particular provision sufficient to convey in-

terests that the parties did not agree to convey elsewhere in the assignment.

Since the "subject to" and habendum clauses do not distinguish this assignment in any significant respect from the document we construed in *Adams,* it follows that the Texas law of property and contractual construction requires us to conclude that the Robinson family did not assign their contingent rights to the suspense money to Alstar. Phillips must now pay the Robinsons in full for the gas taken from their lands in 1956-1965.

The equitable considerations surrounding the problem of interest here are no different from the ones we faced in *Adams,* and our resolution of the issue is the same as in that case. Phillips would ordinarily have to pay interest to the Robinsons for the period in which the pipeline company held and used the suspense that is, on the basis of monthly increments from May 1, 1956, until January 1, 1965, and on the entire principal sum of the suspense money from January 1, 1965, until March 29, 1973, the date of Phillips' unconditional tender of the money into court. However, the Robinson family has asked for interest only from October 1, 1970, the effective date of the FPC's *Hugoton-Andarko* order, and their recovery must be so limited. As there was no evidence presented below with respect to the amount of Phillips' interest obligation, we remand the case to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part and remanded.

(Caption Omitted in Printing)

Petition for Rehearing of Phillips Petroleum Company and Request for Rehearing En Banc

COMES Now the defendant-appellee, Phillips Petroleum Company [PHILLIPS], and respectfully prays this Court to grant a rehearing and that said rehearing be en banc.

This Court, by its opinion entered on May 22, 1975, has affirmed in part and reversed in part the decision of The Honorable Halbert O. Woodward that the assignor-claimants [THE ROBINSON FAMILY], who held the leasehold interest from 1956-1965 at the time the debt owed by PHILLIPS under the percentage-of-proceeds contract for sale of casinghead gas became due and payable, were entitled under Texas law, to receive the supplier's share of "suspense money," collected by PHILLIPS during the pendency of rate-increase applications which became payable when the Federal Power Commission [FPC] approved said increases as part of the Hugoton-Anadarko Rate Case [FPC Opinion 586]; and held further that PHILLIPS was liable for interest.

PHILLIPS' Request for Rehearing should be granted for the following reasons:

1. This Court erred in its application of the Texas law of property and contract interpretation in confirming title to the suspense money so-called;

2. This Court has failed to follow the clear language of TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 and 5069-1.03, and the Texas case law in ruling that interest should be awarded for that period *prior to the time the principal sum became due and payable;*

3. In deciding that under the factual situation present here, equity compels that interest be awarded, this Court disregarded undisputed factual evidence and contract provisions and deprives PHILLIPS of its property without due process;

4. Finally, this Court errs when it repeatedly calls PHILLIPS a "pipeline company," and this prejudicial characterization should be corrected.

The rehearing requested by PHILLIPS should be heard en banc for the following reasons:

1. This proceeding involves questions of first impression and of exceptional importance, both with regard to the law of title and to the law on interest, and a consideration en banc is necessary to rectify the erroneous decision of this Court on both these issues;

2. Consideration en banc also is necessary to secure uniformity of this Court's decisions with regard to the law in Texas, both statutory and decisional, in that notwithstanding the Rules of Decision Act, 28 U.S.C. § 1652 (1966) and *Erie R. R.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court has failed, refused and neglected to follow the mandate of the Texas Legislature and the courts of the State of Texas in ruling that interest may be awarded prior to a time when an obligation becomes due and payable; and

3. Finally, consideration en banc is necessary to maintain a uniformity of this Court's decision in that this decision is in direct conflict with all of this Court's *prior decisions* that hold that interest is calculated only from the date the principal sum is due and payable, and not before; and for the further reason that the award of interest in this case is in direct conflict with the constitutional law pronouncement in *Boutte, et al.* v. *Chevron Oil Company,* 316 F. Supp. 524 (E. D. La. 1970), *affirmed per curiam,* 442 F. 2d 1337 (1971), in that the decision here obliging PHILLIPS to pay interest on money held by it subject to possible refund to pipeline companies for the period prior to the time the FPC has established a just and reasonable rate *deprives* PHILLIPS *of its property without due process,* contrary to what was said in the *Boutte* case.

Argument

In support of the foregoing, Phillips adopts the argument appearing in the Petition for Rehearing of Phillips Petroleum Company and Request for Rehearing En Banc filed contemporaneously with this instrument in Cause No. 74-1777, *Phillips Petroleum Company* v. *Adams,* which is one of the two companion cases to this action.

Conclusion

This Court's judgment, as evidenced by the opinion, is erroneous in view of the matters herein set forth. Phillips renews all other issues and errors raised in its briefs and respectfully prays that a rehearing be granted and that the rehearing be en banc.

Respectfully submitted,

/s/ T. L. Cubbage II
P. O. Box 1751
Amarillo, Texas 79105
Attorney for Appellee
Phillips Petroleum Company

(Certificate Omitted in Printing)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

June 18, 1975

To All Counsel of Record

No. 74-2230—First National Bank of Borger, Etc., Et Al. vs. Phillips Petroleum Company vs. Alstar Prod. Corp.

Dear Counsel:

This is to advise that an order as to Phillips Petroleum Co. has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, *Clerk*

/s/ by Barbara Krei
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2-1365

PHILLIPS PETROLEUM COMPANY, *Plaintiff*,

v.

RIVERVIEW GAS COMPRESSION COMPANY, et al., *Defendants*.

(March 11, 1974)

Memorandum Opinion

The above-styled cause was heard by the court on March 6, 1974 in Amarillo, Texas and all parties were represented in open court by counsel. This Memorandum Opinion shall serve as the court's Findings of Facts and Conclusions of Law. The admissions and stipulations contained in the Pre-Trial Order on file in this case are incorporated herein as part of the Findings of Fact. A summary description of the circumstances attending this case is given below, but the court refers to the above-described parts of the Pre-Trial Order for further specific findings of fact.

This case was instituted by a Complaint in Interpleader filed by plaintiff, Phillips Petroleum Company. The Complaint alleged that Phillips was a stakeholder of a certain sum of money in the amount of $275,220.53 upon which conflicting claims were made by the various defendants. Plaintiff alleged that it was uncertain as to which of the defendants were entitled to the fund, so it interpleaded all the claimants to the fund in the present action for the purpose of having the court decide who was entitled to receive the money and for the purpose of releasing itself from any further liability in relation to the fund.

This fund represents payments which accrued under casinghead gas contracts executed between Phillips and

some of the defendants as the sellers for the purpose of purchasing natural gas produced from tracts of land in Hutchinson County, Texas. Phillips, between June 26, 1955 and September 30, 1970, resold the gas purchased under the casinghead contracts to third parties at a price above the maximum then allowed by the Federal Power Commission. The lease owners then received from Phillips the sum then allowed by the Federal Power Commission and the difference between the maximum allowed by the Federal Power Commission and the actual sales price was held subject to refund to the purchasers by Phillips under Section 4(e) of the Natural Gas Act or, if the Federal Power Commission subsequently approved the higher sales price, Phillips would then be required to pay such difference to the original producers. Under the casinghead contracts Phillips was to pay defendants-sellers a sum computed as a percentage of sales to third party purchasers. But, as above stated, Phillips only paid the defendants-sellers a percentage of the "firm proceeds," which were the portions of the sales prices not subject to possible refund. Phillips had petitioned the Federal Power Commission for a ruling sustaining the sales prices in the amounts by which they exceeded the published maximum. Opinion 586 of the Federal Power Commission, dated September 18, 1970 which had sustained a portion of the excess sales prices, became final on October 28, 1972. Under that decision, Phillips was then bound to recompute the amounts due the sellers under the casinghead contracts and pay the additional amounts to them. However, between June 7, 1954 and September 30, 1970 the title to the mineral estate of the tracts in question changed hands several times. The dispute over the fund in Phillips' possession arose because of the changes in ownership.

The dispute among the various defendants as to entitlement to the fund has now been settled among the parties. Therefore, the only question left before the court is whether Phillips is liable for interest on the moneys they have held

as a stakeholder for the past several years. Each of the defendants named by Phillips in their Complaint, except for two who disclaimed any interest in the fund, has filed a counterclaim against Phillips for interest on the portion of the fund which was sustained by the Federal Power Commission. Phillips has filed a Motion to Dismiss the counterclaims.

As an initial determination, this court finds that the counterclaims are proper under Rule 13, Federal Rules of Civil Procedure, and that the court has jurisdiction to hear and determine the counterclaims. Phillips' technical argument that they are not an "opposing party" within the meaning of Rule 13 is not persuasive. Phillips in its Complaint prays that it is discharged from all liability in connection with the fund, which would of course include discharge from any liability for interest. Phillips is asking for affirmative relief against the defendants and, therefore, this court feels compelled to characterize them as opposing parties for the purposes of Rule 13, *supra*. Further, the court finds that defendants' counterclaims are "compulsory" within the meaning of Rule 13(a). Clearly, the claims for interest arose "out of the transaction or occurrence that is the subject matter of the opposing party's claim." Accordingly, there is no jurisdictional amount requirement as to the counterclaims and the court has ancillary jurisdiction over them. *Childress* v. *Cook*, 245 F.2d 798 (5th Cir. 1957).

The substance of defendants' position with regard to the interest question is that Phillips is liable for interest *eo nomine* on the fund in order to place defendants on a parity with Phillips under the gas purchase agreements, to compensate defendants for Phillips' use of their money between the date of accrual and the date it became payable and to prevent the unjust enrichment of Phillips. Phillips' position, essentially, is that defendants' right to this fund did not accrue until October 28, 1972, that, even upon accrual of defendants' right to the fund, Phillips was unable

to safely disburse the fund because of the conflicting claims thereon and that, therefore, Phillips should not be required to pay interest during any of the period in which it held the fund.

The law is not entirely clear in Texas whether a stakeholder who is uncertain to whom to pay a fund because of conflicting claims to the fund is liable to pay interest to the prevailing claimant for use or possession of the fund during the period of uncertainty. There is a genral rule that interest will not be allowed on a fund while it is in litigation. 47 C.J.S., INTEREST § 25. *Bergendahl* v. *Blanco Oil Co.*, 440 S.W.2d 81 (Tex.Civ.App—Eastland 1969, writ ref'd n.r.e.), was a suit by the life tenant against the remaindermen to establish that the life tenant's interest in the mineral estate was subject to the application of the "open mine doctrine" and against the lessee oil companies for interest on royalties on oil produced from the mineral estate. The defendant oil companies held the royalties but did not invest them for the benefit of the royalty owners. The court held that the oil companies were not under a duty to invest the retained royalties and were not liable for interest thereon because no proper demand was ever made upon them for the funds by any of the other parties. More in point is the Court of Appeals' decision in the Louisiana diversity case of *Gulf Oil Corporation* v. *Olivier*, 412 F.2d 938 (5th Cir. 1969). In that case the plaintiff sued Humble Oil to recover overriding royalty payments under an oil and gas lease. Humble contended that it could not safely make payments under its assignment of overriding royalties to Olivier because of a conflicting lease which carved out overriding royalties to a third party. Humble filed a motion for interpleader of the parties in the conflicting chain of title. The motion was granted by the District Court because it found that Humble could not safely make the payments until title to the lease had been adjudicated. However, the District Court awarded interest on the interplead fund to the prevailing royalty owner.

The Court of Appeals reversed this award of interest on the ground that it was inconsistent with the lower court's finding that Humble could not safely disburse the funds. The court flatly held that Humble correctly withheld the payments pending the outcome of the litigation. The case at bar is closely analogous to *Olivier* and this court is persuaded by its reasoning. Although the ownership of the fund in question has not been in litigation during the entire existence of the fund, there has been a continual dispute over it up through the present. Until the October 28, 1972 affirmance of the Federal Power Commission's ruling allowing the excess charges, there was genuine doubt in Phillips' mind whether the money was to be refunded to the third party purchasers or disbursed to the sellers under the casinghead contracts. And since at least April 2, 1971 through the present there has been a dispute over the fund among the various defendants herein. Thus at no time during its existence has this fund been free from conflicting claims to its ownership.

Similarly, in *Atwood* v. *Humble Oil & Refining Company*, 338 F.2d 502 (5th Cir. 1964), the Court of Appeals upheld a decision of the trial court that the lessor under an oil and gas lease was not entitled to interest on funds retained by the lessee because of the trial court's finding of fact that:

> "[t]he lessee paid plaintiffs all sums due them under the lease as early as it reasonably could do so under all the circumstances associated with and resulting from the institution and prosecution by the plaintiffs of this and earlier litigation asking for cancellation or attacking the validity of the lease and seeking to set aside the partition of the King Estate and the [2023] Trustee's computation of fractional division of interest among the persons sharing therein."

Defendants rely heavily on *Kishi* v. *Humble Oil & Refining Company*, 10 F.2d 356 (5th Cir. 1926), for their contention that a stakeholder is liable to the ultimate owner

for interest for the use of the money held by him. *Kishi*, however, can be distinguished from the present case. *Ashland Oil & Refining Company* v. *Staats, Inc.*, 271 F. Supp. 571 (D. Kansas 1967), established that a party in the position occupied by defendants in this case has no right to receipt of such funds until it is finally determined that the money does not have to be refunded to the purchaser. The court there stated that:

> "Defendants' right to royalties from those receipts can be no greater than the lessee's right to the monies from which those royalties derive. Ashland has no final enforceable right to these funds, for they have not been approved, and may be rescinded. Plaintiff holds them subject to refund, and are responsible for any refund which may be ordered. We perceive no ground on which Ashland should be compelled to pay out sums, for the refund of which it may be liable, and as to which its own right is not finally determined, to royalty owners whose own right to royalties from those funds will be finally determined only when Ashland's own right is determined."

Unlike the *Kishi* situation, there is a judicial determination governing the present case that defendants had no right to possession of the fund until October 28, 1972. And there is a general rule in Texas that interest is not payable until the debt on which it accrues becomes due. 33 Tex. Jur. 2d INTEREST § 5 (1962). Here, the sum could not have become due to defendants until October 28, 1972. Further, a dispute over the fund existed among the defendants herein from sometime prior to October 28, 1972 until the recent settlement of that dispute. Thus, during none of the time that Phillips held the fund would it have been safe for them to disburse the money to the defendants.

At all times during its existence this fund has been the subject of conflicting claims of ownership. Logic and the rules of law discussed above persuade this court that Phillips was under no duty to invest the fund for the benefit

of defendants or to pay interest thereon. Accordingly, it is here ORDERED that any recovery on defendants' counterclaims for interest shall be DENIED.

The court further notes that the defendant-claimants were aware of the existence of this fund and the evidence does not show that any of them made a demand that the money be placed in the Registry of this court. The ruling in this case should not be construed as a denial of interest in other cases where the claimants had no knowledge that the funds were available for payment and where the stakeholder may have failed to reasonably notify the owners or claimants that the funds were available for distribution under the ruling of the Federal Power Commission.

Plaintiff further prayed for costs and a reasonable attorney's fee. *Olivier, supra,* also considered this question. The court, in affirming the trial court's denial of these items, there stated that "[t]hough costs and attorney's fees are ordinarily awarded to the disinterested stakeholder in an interpleader proceeding, the matter is ultimately vested within the sound discretion of the trial judge." It is the court's opinion that the circumstances surrounding this case do not call for the award of these sums. As a matter of discretion, therefore, the court hereby DENIES Phillips' claim for costs and a reasonable attorney's fee.

The attorneys for the defendants are directed to prepare a proposed judgment in accordance with the above, submit such instrument to attorneys for the plaintiff for approval as to form, and then present such approved judgment to the court in Lubbock, Texas on or before March 25, 1974.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 11th day of March A.D. 1974.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
United States District Judge

TEXT OF STIPULATIONS AND ADMISSIONS OF THE PARTIES, NUMBERS 1-45, INCORPORATED BY REFERENCE INTO THE DISTRICT COURT'S MEMORANDUM OPINION AS FINDINGS OF FACT.

The parties admit the following:

1. That on or about March 28, 1955, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 176 at page 386 of the Deed Records of Hutchinson County, Texas), to wit: an area bounded on the north by the north line of Block 47, H&TC RR. Co. Survey; on the east by the east line of Section 19, Block 47, H&TC RR. Co. Survey and the east line of Section 62, Block 46, H&TC RR. Co. Survey; and on the south by Electric City, Texas; and on the west by the east line of Section 29, Block 47, H&TC RR. Co. Survey and the east line of Section 73, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract. Said contract was superseded and terminated by a Casinghead Gas Contract dated April 1, 1957, described hereinbelow.

2. That on or about April 1, 1957, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 203 at page 380 of the Deed Records of Hutchinson County, Texas) with the TRAVIS GROUP, as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to wit: area bounded on the north by the north line of Block 47, H&TC RR. Co. Survey; on the east by the east line of Section 19, Block 47, H&TC RR. Co. Survey and the east line of Section 62, Block 46, H&TC RR. Co. Survey; and on the south by Electric City, Texas; and on the west by the east line of Section 29, Block 47, H&TC RR. Co. Survey and the east line of Section 73, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract. Said contract was superseded and terminated by

a casinghead gas contract dated September 1, 1958, described hereinbelow.

3. That on or about September 1, 1958, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 223 at page 431 of the Deed Records of Hutchinson County, Texas) with the TRAVIS GROUP, as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to wit: an area bounded on the north by the north line of Block 47, H&TC RR. Co. Survey; on the east by the east line of Section 19, Block 47, H&TC RR. Co. Survey and the east line of Section 62, Block 46, H&TC RR. Co. Survey; and on the south by Electric City, Texas, and on the west by the east line of Section 29, Block 47, H&TC RR. Co. Survey, and the east line of Section 73, Block 46, H&TC RR. Co. Survey. On or about December 5, 1959, said contract was amended to add additional lands to the lands already covered by said contract, said new land being Section 73, Block 46 H&TC RR. Co. Survey, Hutchinson County, Texas. The amendment is recorded in Volume 242 at page 460 of the Deed Records of Hutchinson County, Texas. Said contract was also amended on July 24, 1962, and August 15, 1967. Said contract provided that seller was to receive as the payment due the prices shown in said contract.

4. That on or about March 7, 1950, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 134 at page 325 of the Deed Records of Hutchinson County Texas) with Addison Warner, as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to wit: the north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract. Said contract was superseded and terminated by a

casinghead gas contract dated September 21, 1955, described hereinbelow.

5. That on or about September 21, 1955, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 182 at page 98 of the Deed Records of Hutchinson County, Texas) with Addison Warner, as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to wit: the north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract. Said contract was superseded and terminated by a casinghead gas contract dated May 29, 1957, described hereinbelow.

6. That on or about May 29, 1957, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 267 at page 72 of the Deed Records of Hutchinson County, Texas) with Addison Warner as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to wit: the north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract. Said contract was superseded and terminated by a casinghead gas contract dated April 29, 1966, described hereinbelow, but was amended prior to termination on June 6, 1962, and supplemented on February 24, 1964, recorded in Volume 296, page 486 of the Deed Records of Hutchinson County Texas.

7. That on or about April 29, 1966, PHILLIPS, as buyer, entered into a Casinghead Gas Contract (recorded in Volume 325 at page 423 of the Deed Records of Hutchinson County, Texas) with DAY, as seller, to purchase casinghead gas produced from wells located on the following described tract of land in Hutchinson County, Texas, to

wit: the north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey. Said contract provided that seller was to receive as the payment due the prices shown in said contract.

8. That, from time to time, from June 26, 1955, to September 30, 1970, PHILLIPS purchased casinghead gas under the aforesaid gas contracts.

9. That by various orders issued since the United States Supreme Court, on June 7, 1954, decided *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 346 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1036, and determined that Phillips, as and independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale, was a "natural gas company" with the Natural Gas Act, the Federal Power Commission (FPC) suspended increases in prices for sales of residue gas filed by Phillips and permitted such increases to be collected beginning at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing a corporate undertaking with the FPC to refund all or any portion of such increases which the FPC might not find to have been justified.

10. That subsequent to June 26, 1955, Phillips sold gas obtained under the above-referenced casinghead gas contracts, and other contracts, subject to the jurisdiction of the FPC, at prices, a portion of which had not been approved by the FPC; the increased sales prices of the gas were collected by Phillips subject to a duty to refund the same to the purchasers in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act (15 U.S.C. 717c(e); and until such time as the FPC approved such increased sales prices or a portion of said prices, there was no right in B. E. Hill, Addison Warner, the Travis Group, Day, Trustee or Bank to recover from Phillips any such monies held subject to refund.

11. That Phillips collected the higher rates subject to refund. Increases in gas sales prices not made effective subject to FPC approval cannot be made retroactive.

12. That Phillips had applications before the FPC requesting permission to increase the prices for sales of residue gas and such applications, for this area, were consolidated in FPC Dockets AR 64-1, et al.

13. That on September 18, 1970, the FPC issued Opinion 586, Dockets No. AR 64-1, et al., Hugoton-Anadarko Rate Cases, 44 FPC 761, which established sales prices applicable to gas sales and established refund requirements; on July 31, 1972, the Court of Appeals for the Nnith Circuit affirmed the above-said Opinion 586 in *The People of State of California, et al.* v. *Federal Power Commission,* No. 71-1036, reported at 466 F.2d 974, et seq., and, as of October 28, 1972, no writ of certiorari was filed by any of the parties to said Ninth Circuit action.

14. That after Opinion 586 became final, the monies collected subject to refund could be divided into two classes, "sustainable" money and "refundable" money. The "sustainable" monies are those which, according to Opinion 586, represent lawful proceeds from the sales of gas. It is from these lawful proceeds that the parties from which Phillips purchased casinghead gas receive, as their part payment, a sum computed in relation to the price for which Phillips sold gas within the Panhandle Field of Texas to third parties. The "refundable" monies are those which, according to Opinion 586, represent sums in excess of the just and reasonable rate; i.e., the sums in excess of the lawful proceeds from the sales of gas.

15. That this action does not involve "firm proceeds"; that is, the proceeds derived from sales of gas within the Panhandle Field of Texas to third parties at prices which were at or below the rate which had already been approved by the FPC.

16. On and after October 28, 1972, and under the sales prices approved by the Federal Power Commission in Opinion 586, a sum of money equal to the sustainable portion of the suspense fund attributed to the working interests in the lease(s) covered by the casinghead gas contracts referenced hereinabove for the period between June 7, 1954, and September 30, 1970, as to the casinghead gas contracts covering the following described property, to wit:

> The north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey, Hutchinson County, Texas;

and for the period between June 26, 1955, and September 30, 1970, as to the casinghead gas contracts covering the following described properties, to wit:

> An area bounded on the north by the north line of Block 47, H&TC RR. Co. Survey; on the east by the east line of Section 19, Block 47, H&TC RR. Co. Survey and the east line of Section 62, Block 46, H&TC RR. Co. Survey; and on the south by Electric City, Texas; and on the west by the east line of Section 29, Block 47, H&TC RR. Co. Survey and the east line of Section 73, Block 46, H&TC RR. Co. Survey; and all of Section 73, Block 46, H&TC RR. Co. Survey, all in Hutchinson County, Texas;

that is, $275,220.53 became due and payable to the lawful owner or owners of said monies.

17. On March 28, 1955, B. E. Hill, also known as Bernard E. Hill, was the owner of the working interest of the lease(s) covering an area bounded on the north by the north line of Block 47, H&TC RR. Co. Survey; on the east by the east line of Section 19, Block 47, H&TC RR. Co. Survey and the east line of Section 62, Block 46, H&TC RR. Co. Survey; and on the south by Electric City, Texas; and on the west by the east line of Section 29, Block 47, H&TC RR. Co. Survey and the east line of Section 73, Block 46, H&TC RR. Co. Survey, all in Hutchinson County,

Texas, hereinafter called the "Riverview Tract". At some time prior to April 1, 1957, Riverview Gas Compression Company, a partnership, acquired the interest of B. E. Hill in and to the said "Riverview Tract".

18. On November 10, 1965, effective as of September 30, 1965, at 7:00 a.m. Arnold Travis, M. M. Travis, Julius Fligelman and Edward Meltzer, acting for and on behalf of Riverview Gas Compression Company, executed three instruments, to wit:

> a. An untitled instrument, being a bill of sale, dated November 10, 1965, recorded in Volume 10 at page 541 of the Bill of Sale Records of Hutchinson County, Texas;
>
> b. An Assignment of Casinghead Gas Contracts dated November 10, 1965, recorded in Volume ——— at page ——— of the Deed Records of Hutchinson County, Texas; and
>
> c. An Assignment of Leases with Reservation of Production Payment date November 10, 1965, but effective as of September 30, 1965, at 7:00 a.m., recorded in Volume 320 at page 201 of the Deed Records of Hutchinson County, Texas.

The buyer-grantee-assignee in all of the above-said three instruments was W. M. Day, Jr., also known as William M. Day, Jr., and the interest covered related to the "Riverview Tract". In the Assignment of Leases with Reservation of Production Payment, the grantor excepted and reserved unto itself a production payment equal to an undivided fifty percent (50%) of the oil, gas and other minerals produced, saved and sold from/or attributed to the subject interest. This reserved production payment is hereinafter referred to as the "Riverview Tract Production Payment".

19. On November 10, 1965, Arnold Travis, Edward Meltzer, Jr., Julius Fligelman, and M. M. Travis assigned the "Riverview Tract Production Payment" unto Pensco, Inc.,

as Trustee, effective September 30, 1965, at 7:00 a.m. This Assignment of Production Payment is recorded in Volume 320 at page 220 of the Deed Records of Hutchinson County, Texas.

20. On March 7, 1950, Addison Warner was the owner of the working interest of the lease(s) covering a tract sometimes described as the north 160 acres of Section 71, Block 46, H&TC RR. Co. Survey, Hutchinson County, Texas, and more particularly described as:

> All of that part of Section 71, Block 46, H&TC RR. Co. Survey, Hutchinson County, Texas, lying north of the south 480 acres thereof and south of a meandering line located 10 feet to the south of the south riverbed line of the Canadian River, containing 160 acres, more or less, hereinafter referred to as the "Warner Tract".

21. On June 13, 1966, Addison Warner assigned his interest in the "Warner Tract" to W .M. Day, Jr., effective April 1, 1966, at 7:00 a.m., reserving unto himself as grantor a production payment equal to an undivided sixty percent (60%) of the oil, gas and other minerals, produced, saved, and sold from or attributed to the subject interest, hereinafter referred to as the "Warner Tract Production Payment." This Assignment of Lease with Reservation of Production Payment is recorded in Volume 326 at page 336 of the Deed Records of Hutchinson County, Texas.

22. On June 13, 1966, Addison Warner assigned the "Warner Tract Production Payment" unto Pensco, Inc., as trustee, effective April 1, 1966, at 7:00 a.m. This Assignment of Production Payment is recorded in Volume 326 at page 345 of the Deed Records of Hutchinson County, Texas.

23. On October 10, 1966, W. M. Day, Jr., et ux., bargained, sold, transferred, assigned and conveyed unto Clinton Oil Company all of his interest in the "Riverview Tract" and the "Warner Tract", effective September 1, 1966, at 7:00

a.m. The untitled transfer document is recorded in Volume ——— at page ——— of the Deed Records of Hutchinson County, Texas.

24. On September 25, 1967, Clinton Oil Company, assignor, set over unto Union National Bank, Wichita, Kansas, as Escrow Agent, an undivided thirty-six and two-thirds percent (36⅔%) of an undivided eleven-sixteenths (11/16) working interest in the oil and gas lease covering the "Warner Tract", hereinafter called the "Escrow Interest", effective October 1, 1967. The instrument of assignment is recorded in Volume 339 at page 485 of the Deed Records of Hutchinson County, Texas.

25. On March 15, 1971, Union National Bank, as Escrow Agent, assignor, set over unto Clinton Oil Company, the "Escrow Interest", effective March 1, 1971. The instrument of assignment is recorded in Volume 368 at page 564 of the Deed Records of Hutchinson County, Texas.

26. On March 18, 1971, Clinton Oil Company executed an Assignment of Leases to be effective April 1, 1971, at 7:00 a.m., C.S.T., wherein it assigned unto Pensco, Inc., Trustee, all of its interest in oil and gas leases covering the "Riverview Tract" and the "Warner Tract". Said document contains a non-merger clause which states that it is the intent of grantor and grantee that the interest conveyed by the March 18, 1971, assignment will not merge into the "Riverview Tract Production Payment" and "Warner Tract Production Payment" interest already owned by Pensco, Inc., Trustee. This instrument is recorded in Volume 368 at page 684 of the Deed Records of Hutchinson County, Texas.

27. On March 18, 1971, Clinton Oil Company executed an Assignment of Property, to be effective as of April 1, 1971, at 7:00 a.m., C.S.T., wherein it assigned unto Pensco, Inc., Trustee, all of its right, title and interest in and to the personal property, contract rights and other property rights

located in, related or used in connection with the "Riverview Tract" and the "Warner Tract". Said document contains a clause which provides as follows:

> "Grantee is hereby subrogated to all rights, powers and privileges of Grantor existing by virtue of prior warranties, representations, covenants, and agreements pertaining to the properties and interests covered hereby, and Grantor hereby expressly assigns and releases to Grantee all claims which Grantor may have (if any) for underpayment or nonpayment of production run proceeds and/or breach of gas purchase agreements."

This assignment of properties is recorded in Volume 368 at page 698 of the Deed Records of Hutchinson County, Texas.

28. On April 13, 1971, Pensco, Inc., Trustee, executed an Assignment of Leases and Properties, to be effective as of April 1, 1971, at 7:00 a.m., C.S.T., wherein assignor assigned all of its rights, title and interest in and to the "Riverview Tract" and the "Warner Tract" to Santa Fe Oil Company, grantee, subject to the "Riverview Tract Production Payment" and the "Warner Tract Production Payment"; however, the two said production payments are merged as one single production payment payable out of and from 50% of the net proceeds of production attributable to the subject leasehold estates, hereinafter called the "Merged Production Payment", assignor reserving unto itself, "the right to all proceeds from production runs up to the effective date hereof, including such proceeds (if any) which may be in suspense attributable to the leasehold estate." This instrument is recorded in Volume 369 at page 591 of the Deed Records of Hutchinson County, Texas.

29. On January 19, 1966, Bernard E. Hill (on behalf of Travis Group) sent, and in due course of the post, Phillips received a letter which said, in pertinent part:

> "While on the subject of the casinghead gas contract which we transferred to Mr. Day, please be advised that there was reserved to the Seller by the original contract of sale all right to the gas price increases impound under FPC direction for gas produced to the effective date of the sale, September 30, 1965. I will appreciate very much your letting us know the total amount of funds so impounded by you for the account of Riverview Gas Compression Co. for production to September 30, 1965, together with the total amount of interest accrued thereon to that date. In addition, I request you to acknowledge receipt of this notification that the price increases so impounded, with interest thereon until finally released, will be payable to Riverview Gas Compression Co. (the old partnership), that transferred the booster contract to Mr. Day."

30. On January 21, 1966, Robert J. Hearon, Jr. (on behalf of Day) sent, and in due course of the post, Phillips received, a letter which said, in pertinent part:

> "As to the amounts in FPC Suspense referred to in the third paragraph of Mr. Hill's letter, this will confirm that Mr. Hill accurately sets forth the agreement between the parties. Even though your company is utilizing a different effective date for current gas payments, we are sure that September 30, 1965, can be utilized as the effective date for the FPC Suspense Account. That is, all sums suspensed for gas produced prior to September 30 belong to the M. M. Travis group, while suspense funds attributable to production from and after that date should be credited to Mr. Day."

31. On June 14, 1966, Addison W. Warner sent, and in due course of the post, Phillips received, a letter which said, in pertinent part:

> "This is to advise that I have sold the working interest in each of the above leases to W. M. Day, Jr., Austin, Texas, and Pensco, Inc., Trustee, care of The National Bank of Commerce, San Antonio, Texas, in accordance with instruments submitted to you herewith, and I ask that transfer orders be drawn reflecting this sale at the earliest convenient date.

"In addition, you are hereby advised that this sale includes any and all payments for gas attributable to the above property which may have been held in suspense pending Federal Power Commission approval, and when and if any such sums held in suspense are released they shall be paid to the buyers in this transaction without regard to the production period to which such sums are attributable."

32. On October 10, 1966, Clinton Oil Company sent, and in due course of the Post, DAY received a letter which said, in pertinent part:

"Reference is made to the transaction between us of even date herewith in which you have assigned to us those certain leases in Hutchinson County, Texas, more particularly described in Schedule 'A' in the assignment, together with the assets of Riverview Gas Compression Company.

"This is to confirm that all proceeds of production, including any part of the proceeds of sale of casinghead gas which may be held in suspense by the purchaser of such gas pending Federal Power Commission approval of price, accruing prior to 7:00 a.m., C.S.T., September 1, 1966, are not included in the sale and assignment to us. Clinton Oil Company asserts no entitlement to any proceeds, including any F.P.C. Suspense items, which may be accrued prior to the above effective date."

33. On January 19, 1967, W. W. Ledlie (on behalf of PHILLIPS) sent, and in due course of the Post, R. J. Hearon (on behalf of DAY) received, a letter which said, in pertinent part:

"This replies to your letter of January 16, 1967, concerning verification of the sum paid Mr. W. M. Day, Jr. pursuant to his Indemnity Agreement.

"We are enclosing a copy of Mr. Warner's letter to Phillips Petroleum Company dated June 14, 1966. Please note that Mr. Warner says that he has sold the working interest to Mr. Day and Pensco, Inc., Trustee.

Please note also Mr. Warner's statement that when and if any such sums held in suspense are released that they should be paid to the *buyers* (emphasis added) in this transaction without regard to the production period to which such sums are attributable. In view of this language, our Legal Department requires that we be furnished disclaimers from Pensco, Inc., Trustee, and from The National Bank of Commerce, San Antonio, Texas, as to any FPC suspense accruals prior to their acquisition of interest. If you will provide same to the undersigned, we will immediately review the matter with our Legal Department."

34. On January 27, 1967, W. M. Day, Jr., Pensco, Inc., Trustee, and The National Bank of Commerce of San Antonio executed a written instrument relating to the Oil, Gas and Mineral Lease from J. A. Whittenburg, Jr., et al., to A. W. Warner, dated October 21, 1949, recorded in Volume 127, page 435, et seq., of the Deed Records of Hutchinson County, Texas, insofar as said lease covers from the surface down to a depth of 250 feet below sea level in the following described land in Hutchinson County, Texas:

All that part of Section 65, Block 46, H&TC Ry. Co., lying north of the south 467 acres thereof and south of a meander line located 10 feet to the south of the south riverbed line of the Canadian River, containing 142 acres, more or less; and

All that part of Section 71, Block 46, H&TC Ry. Co., lying north of the south 480 acres thereof and south of a meander line located 10 feet to the south of the south riverbed line of the Canadian River, containing 160 acres, more or less;

Said instrument recites, among other things, as follows:

"2. Pensco and the National Bank of Commerce hereby disclaim any interest in oil, gas or other mineral produced from said lease and the lands covered thereby, as described in Exhibit A, prior to 7:00 a.m. April 1, 1966, including specifically, but not by way of limitation, any proceeds of sale of gas produced prior to such date

held in suspense pending Federal Power Commission approval of a gas price increase."

35. On April 2, 1971, Charles D. Schultz (on behalf of The National Bank of Commerce of San Antonio) sent, and in due course of the Post, Phillips received, a letter which said, in pertinent part:

> "Enclosed herewith please find a Xerox copy of each of the executed originals of instruments entitled 'Assignment of Property' and 'Assignment of Leases' both effective April, 1971, at 7:00 A.M. These instruments were executed by Clinton Oil Company as Grantor, transferring their interests in certain Property and Leases in Hutchinson County, Texas to Pensco, Inc., Trustee.
>
> "In both instruments, Clinton Oil Company as Grantor, expressly assigns and releases to Pensco, Inc., Trustee, as Grantee, all claims which Grantor may have for underpayment or nonpayment of production run proceeds and/or breach of gas purchase agreement.
>
> • • •
>
> "Pensco Inc., Trustee now claims under this assignment and prior assignments all suspended gas or oil (if any) proceeds that you may be holding but not limited to the date such interests were acquired. This claim includes any funds now held from the date Phillips first initiated such procedures in so far as these leases are concerned. We therefore request that these suspended proceeds be paid to us under conditions as may be required by Phillips."

36. On November 29, 1971, James M. Wright (on behalf of The National Bank of Commerce of San Antonio) sent, and in due course of the Post, Phillips received, a letter which said, in pertinent part:

> "In accordance with the request of Mr. Schultz in his conversation with you, please furnish us with a schedule showing all amounts held in suspense pending and subsequent to approval of gas price increases by

> the Federal Power Commission, which are attributable to all of the working interests and production payment interests in the above captioned properties. Said properties are described in the Assignment of Leases from Clinton Oil Company to Pensco, Inc., Trustee executed March 18, 1971, a copy of which has been furnished to your office. This request includes but is not limited to the periods of time when the captioned properties were owned and/or operated by M. M. Travis, et al, Addison Warner, W. M. Day, Jr., and Clinton Oil Company. In addition please include in your schedule the amounts paid to W. M. Day, Jr., and the associated periods of time and interests to which those amounts were attributable."

37. On August 15, 1972, Benard E. Hill (on behalf of the TRAVIS GROUP) sent, and in due course of the Post, PHILLIPS received, a letter which said in pertinent part:

> "Please be advised that our records show that when Pensco, Inc. acquired whatever interest it may have in the Riverview Gas contract with your company, it did so with full knowledge that such interest covered only gas run into your lines, after the effective date of the Riverview Gas et al/W. M. Day, Jr. transaction, to-wit, December 1, 1965.
>
> "I assume that Pensco, Inc., in making a claim on you for the suspended gas price proceeds furnished you with some alleged claim of right or color of title thereto.
>
> "If you will let me know what Pensco gave you as the basis for its claim, I believe it will expedite and facilitate the resolution of the purported controversy. You will, of course, not release any of the pre-October 1, 1965 suspended proceeds without our consent, pending such resolution."

38. On January 23, 1973, Paul Smith (on behalf of TRUSTEE and BANK) called PHILLIPS and spoke with Clayton LaGrone of Phillips' Legal Department. Mr. LaGrone dictated a memorandum of the conversation and

the same was typed on January 25, 1973. The memorandum of conversation reads as follows, in pertinent part:

> "Mr. Smith stated the position of the Bank.. He stated that the Bank had no knowledge (prior to making the loan) of the contract between the Riverview Group and Mr. Day in which the proceeds attributable to the interests involved which were held in suspense were to belong to the Riverview Group. The Bank is very definitely claiming that it is a bona fide purchaser for value. It is also the Bank's position that the contract provision does not apply in any event since (under their interpretation) the Assignment assigns such funds and that the contractual rights merged in the Assignment.
>
> "Mr. Smith urged Phillips to hold onto the money or file an interpleader action. If Phillips pays the money to the Riverview Group the Bank will sue Phillips along with the Riverview Group to obtain the funds.
>
> "I told Mr. Smith we would review the matter and I would let him know what we decided to do."

39. On February 5, 1973, W. W. Ledlie (on behalf of PHILLIPS) sent, and in due course of the Post, Mr. Richard Carver (on behalf of the TRAVIS GROUP) received a letter which read, in pertinent part:

> "The entire file including your letter of January 19, 1973, has been reviewed with our Legal Department. Both your clients and Pensco, Inc., Trustee are making claims to the funds held by Phillips representing accrued gas proceeds which have now been approved by the Federal Power Commission.
>
> "Phillips cannot pay either party until this dispute is resolved. Further, since both parties are actively claiming the proceeds, Phillips cannot in fairness favor one side over the other by paying the funds under an indemnity agreement.
>
> "Phillips stands willing to pay these funds to the party entitled to them as finally determined by agreement among the parties or by a court of competent jurisdiction.
>
> "I trust that the controversy will be settled in the near future."

40. Admissions Nos. 29 through 39, both inclusive, shall be considered as evidence solely for the purpose of showing the existence of a dispute among the answering defendants regarding the ownership of the funds involved in this action; except that Admissions Nos. 31 and 32 also shall be considered for the purpose of determining title.

41. That Defendants Santa Fe Oil Company and the Union National Bank of Wichita, Kansas, Escrow Agent, have disclaimed any interest in the above-said sum.

42. That the TRAVIS GROUP, DAY, TRUSTEE and BANK have compromised and settled their claims in the above-said sum and all agree that the same should be divided as follows:

a. To the TRAVIS GROUP:	$154,270.95
b. To DAY:	$ 36,782.19
c. To TRUSTEE and BANK:	$ 84,167.39

43. That the TRAVIS GROUP, DAY, TRUSTEE and BANK agree that if the Court awards attorney fees and costs to PHILLIPS, then each of the defendants shall bear such attorney fees and costs out of the entire fund in the following ratios:

a. TRAVIS GROUP:	87%
b. DAY:	13%
c. TRUSTEE and BANK:	0%

44. That for the purpose of this action, and this action only, TRAVIS GROUP, DAY, TRUSTEE and BANK agree that each and all were (at all times relevant herein) a "natural

gas company'' within the Natural Gas Act; that they were subject to the Natural Gas Act; and that they also were subject to the Regulations of the FPC promulagted under the Natural Gas Act, including (but not limited to) § 154.91(e) of the said regulations of the FPC.

45. That insofar as the printed portions thereof are concerned, each of the applicable printed Casinghead Gas Contract agreements are standard Phillips Petroleum Company forms prepared in their entirety by plaintiff, Phillips.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2009

PHILLIPS PETROLEUM COMPANY, *Plaintiff-Appellee,*

v.

RIVERVIEW GAS COMPRESSION COMPANY, ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Texas

Judgment

(May 22, 1975)

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby

remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-aippellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

[Caption Omitted in Printing]

Opinion

(May 22, 1975)

Before TUTTLE, GEWIN and GOLDBERG, *Circuit Judges.*

GOLDBERG, *Circuit Judge:*

This is the third case in today's suspense money trilogy; here, as in Phillips Petroleum Co. v. Adams, 5 Cir. 1975, 513 F.2d 355 [May 22, 1975, No. 74-1777], and in First National Bank v. Phillips Petroleum Co., 5 Cir. 1975, 513 F.2d 371 [May 22, 1975, No. 74-2230], we are asked to determine whether interest should be paid on suspense money held by Phillips Petroleum Company [Phillips] in varying amounts since 1955, and now due as partial payment for gas produced pursuant to percentage-of-proceeds sales contracts similar to those involved in *Adams* and *First National Bank.* The district court ruled that Phillips was not liable for any interest. For the reasons stated in our *Adams* opinion, we believe that Phillips must pay interest on the suspense money that it held and used for so long; we reverse the judgment of the district court.

From June 26, 1955, until September 30, 1970, Phillips took casinghead gas from lands belonging to the various claimants here, and situated in Hutchinson County, Texas. These purchases were made according to several percentage-of-proceeds sales contracts, and, as in *Adams* and *First National Bank,* Phillips made monthly payments to the holders of the particular mineral estates on the basis of the ''firm proceeds'' of its sales to third parties. Phil-

lips withheld payment of the suspense money which it collected pending Federal Power Commission approval of the higher rates which the pipeline company actually charged its own customers throughout the period of the disputed sales. The mineral rights to the two tracts of land involved in this case changed hands so often during this fifteen-year period, that we will not attempt to trace all of those transactions. Suffice it to say that the assignments were of the sort in controversy in *Adams* and *First National Bank,* and that after the FPC's Hugoton-Andarko Rate Case, Op: 586, 44 F.P.C. 761, aff'd, 9 Cir. 1972, 466 F.2d 974, apprised Phillips of which portion of the suspense money it could keep, and which it had to refund to its customers, the assignor-claimants and assignee-claimants here besieged Phillips with conflicting demands for the $275,220.53 now due for the gas which the pipeline company had purchased between 1955 and 1970. Phillips commenced this interpleader action on March 12, 1973, and made an unconditional tender of the funds into court at that time, although it did not actually pay the money into the court registry until February 11, 1974.

Before this case went to trial, the several claimants, assignors and assignees alike, adopted the salutary course of resolving their disagreements with respect to the principal sum of the suspense money, in settlement agreements dated June 1, 1973, and January 31, 1974, so that neither the district court nor this court has been forced to unravel the various entitlements to the principal sum. The only question submitted to the district court was whether Phillips should pay interest on the suspense money for the fifteen years in which the pipeline company enjoyed the use of the money; for the reasons set out at length in *Adams,* we conclude that the law of Texas permits the award of interest here, and that equitable considerations require such an award. This case differs from *Adams* and *First National Bank* in that both assignors and assignees here demand interest, and that all these claimants ask for interest for the entire period in which Phillips held and used the principal sum to which they are now entitled. Another distinguishing feature of this case is that the claimants have agreed on the division of interest in the settlement agreements referred to above. We now remand this case to the district court for a determination of the amount of interest which Phillips must pay to each of the various claimants, consistent with *Adams* and the settlement agreements. For the reasons stated in *Adams,* Phillips need not pay interest for the period subsequent to March 12, 1973, the date of its unconditional tender of the principal sum into court.

Reversed and remanded.

[Caption Omitted in Printing]

Petition for Rehearing of Phillips Petroleum Company and Request for Rehearing En Banc

COMES Now the plaintiff-appellee, Phillips Petroleum Company [PHILLIPS], and respectfully prays this Court to grant a rehearing and that said rehearing be en banc.

This Court, by its opinion entered on May 22, 1975, has held that PHILLIPS was obligated to pay interest to both the assignors and the assignees on their respective shares of the "suspense money" so-called which PHILLIPS collected from its purchasers during the pendency of numerous rate increase applications where PHILLIPS had the use of the supplier's share of the money during the rate increase proceedings.

PHILLIPS' Request for Rehearing should be granted for the following reasons:

1. This Court has failed to follow the clear language of TEX. REV. CIV. STAT. ANN. arts. 5069-1.01 and 5069-1.03, and the Texas case law in ruling that interest should be awarded for that period *prior to the time the principal sum became due and payable;*

2. In deciding that under the factual situation present here, equity compels that interest be awarded, this Court disregarded undisputed factual evidence and contract provisions and deprives PHILLIPS of its property without due process;

3. The Trial Court was, and this Court is, *without jurisdiction* to entertain the counterclaim for interest, or to award interest, in this interpleader action, where PHILLIPS did not, and does not, claim title to the interpleaded fund; and

4. Finally, this Court errs when it repeatedly calls PHILLIPS a "pipeline company", and this prejudicial characterization should be corrected.

The rehearing requested by PHILLIPS should be heard en banc for the following reasons:

1. This proceeding involves questions of first impression and of exceptional importance, with regard to the law on interest, and a consideration en banc is necessary to rectify the erroneous decision of this Court on this issue;

2. Consideration en banc also is necessary to secure uniformity of this Court's decisions with regard to the law in Texas, both statutory and decisional, in that notwithstanding the Rules of Decision Act, 28 U.S.C. § 1652 (1966) and *Erie R. R.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court has failed, refused and neglected to follow the mandate of the Texas Legislature and the courts of the State of Texas in ruling that interest may be awarded prior to a time when an obligation becomes due and payable;

3. Consideration en banc is necessary to maintain a uniformity of this Court's decisions, in that this decision is in direct conflict with all of this Court's *prior decisions* that hold that interest is calculated only from the date the principal sum is due and payable, and not before; and for the further reason that the award of interest in this case is in direct conflict with the constitutional law pronouncement in *Boutte, et al.* v. *Chevron Oil Company,* 316 F. Supp. 524 (E. D. La. 1970), *affirmed per curiam,* 442 F. 2d 1337 (1971), in that the

decision here obliging PHILLIPS to pay interest on money held by it subject to possible refund to pipeline companies for the period prior to the time the FPC has established a just and reasonable rate *deprives* PHILLIPS *of its property without due process,* contrary to what was said in the *Boutte* case; and

4. Finally, consideration en banc is necessary to secure a uniformity of decisions among the Circuits with regard to whether or not the Court has *jurisdiction* to entertain a counterclaim for interest in an interpleader action, where the interpleader party does not assert a claim against the fund, the United States Court of Appeals for the Fourth and Tenth Circuits having ruled heretofore that no such jurisdiction exists.

ARGUMENT

In support of the foregoing, PHILLIPS adopts the argument appearing in the Petition for Rehearing of Phillips Petroleum Company and Request for Rehearing En Banc filed contemporaneously with this instrument in Cause No. 74-1777, *Phillips Petroleum Company* v. *Adams,* which is one of the two companion cases to this action.

CONCLUSION

This Court's judgment, as evidenced by the opinion, is erroneous in view of the matters herein set forth. PHILLIPS renews all other issues and errors raised in its briefs and respectfully prays that a rehearing be granted and that the rehearing be en banc.

Respectfully submitted,

/s/ T. L. CUBBAGE II
P. O. Box 1751
Amarillo, Texas 79105
Attorney for Appellee
Phillips Petroleum Company

[Certificate Omitted in Printing]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

June 18, 1975

To All Counsel of Record

No. 74-2009—Phillips Petroleum Co. v. Riverview Gas Compression Co., Et Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, *Clerk*

by /s/ Barbara Krei
Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

No. 75-412

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

J. H. ADAMS, ET AL, RIVERVIEW GAS COMPRESSION COMPANY, ET AL, and FIRST NATIONAL BANK OF BORGER, *Respondents.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-412

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

J. H. ADAMS, ET AL, RIVERVIEW GAS COMPRESSION COMPANY, ET AL, and FIRST NATIONAL BANK OF BORGER, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Reference to the official and unofficial reports of the opinions delivered in the Courts below correctly appear at pages one and two of the petition. (Pet. 1-2)

JURISDICTION

The asserted jurisdiction is under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations which the case involves are contained in the petition at page three (Pet. 3) and the appendix thereto beginning at page 1a.

QUESTIONS PRESENTED

The "questions presented" set forth in the petition (Pet. 2) are based on the erroneous assumption that the Texas interest statutes and decisions do not permit recovery of interest for the *use* of money prior to the final maturity of the principal debt.

The Texas interest statute expressly provides for the recovery of interest for the *use* of money (as well as for the *detention* of money) and the only state Court decision and the only previous decision by the Court of Appeals for the Fifth Circuit which involved a claim of interest for the *use* of money prior to the final maturity of the principal debt are in harmony with and precisely followed by the Court of Appeals in these cases.

STATEMENT OF THE CASE

The "statement of the case" set forth in the petition (Pet. 3-7) is correct for the most part but omits certain facts which Respondents consider essential for a complete understanding of the cases.

During all the time material, the casinghead gas produced from Respondents' leases was sold to Petitioner (hereinafter referred to as "Phillips") under *percent of proceeds* contracts. Although at some point in time such gas was sold under *flat rate* contracts, the principal fund upon which Respondents are entitled to interest accrued under the percent of proceeds contracts. All of the pertinent contracts are in substantially the

same form as the contract at pages 186-193 of the printed appendix filed in the Riverview case in the Court of Appeals.

Under the pricing provisions of the contracts, Phillips was obligated to account to Respondents at a rate determined, in part, by multiplying the volume of gas produced from Respondents' leases by a factor equal to a percent of the weighted average price received by Phillips and its subsidiaries from the sale to others of gas within the Panhandle Field of Texas.

The payment provision of the contracts required that payment for all gas delivered each month be made not later than the last day of the succeeding month.

Although the contracts are made subject to all valid statutes and rules and regulations of any duly constituted federal or state regulatory body having jurisdiction, the only contract provision giving Phillips the right to withhold any payment was a circumstance in which Respondents' *title to the gas* is questioned or involved in litigation. It is undisputed that title to Respondents' gas has never been in question nor involved in litigation, within the meaning of the contracts. Phillips' contractual defense to liability for interest was denied by the Court of Appeals. *Phillips Petroleum Company* v. *Adams,* 513 F2 355 (369).

Between June 7, 1954, the date the Federal Power Commission (hereinafter called "FPC") began regulation of the wellhead price of natural gas sold in interstate commerce, and October 28, 1972, the date that Federal Power Commission Opinion 586 became final, Phillips sold gas from the Panhandle Field of Texas to third parties, and at rates, some of which, were in excess of the then applicable area ceiling rates

established by the FPC. Such higher rates were put into effect by Phillips after filing applications with the FPC to increase the price and were thereafter permitted by the Commission, subject to Phillips' filing of a corporate undertaking to insure that any part of the increased rate in excess of the just and reasonable rate as finally determined by the FPC would be refunded to Phillips' purchasers, together with interest at the rate of seven percent (7%), per annum.

During the time material to these cases, Phillips accounted to Respondents on the basis of the then approved FPC ceiling prices. The price differential between Phillips' then effective contract rate and the FPC ceiling price, was retained by Phillips. There accumulated a substantial sum of money which may be characterized as suspense funds which, insofar as it was attributable to the contract price payable to Respondents for gas produced from their leases, would ultimately belong, in its entirety, either to Respondents or to interstate purchasers of gas from Phillips. Phillips has never owned or been entitled to any interest in the suspense funds which represent a part of the price payable to Respondents under the contracts for gas produced from their leases. Notwithstanding, Phillips has held such funds to secure the refund obligations under its corporate undertaking filed with the FPC.

After FPC Order 586 became final, Phillips divided the suspense funds, representing a part of the contract price for Respondents' gas into two catagories: (i) *refundable monies* and (ii) *sustainable monies.* The refundable monies were ultimately refunded to Phillips' third party, interstate purchasers, together with in-

terest at the rate of seven percent (7%) per annum as required by the FPC's regulations. Phillips paid the sustainable monies into the registry of the United States District Court for the Northern District of Texas, Amarillo Division, when a dispute over ownership of the funds occurred but refused to pay statutory interest for the use of the sustainable monies.

The sustainable monies represent the principal amount upon which Respondents are entitled to statutory interest. It is undisputed and the Court of Appeals, in the *Adams Case* 513 F2 355 (366) noted that "In this case Phillips collected money over a period of several years which would ultimately be refunded to its customers or paid to its suppliers; in no event did Phillips ever have the slightest prospect of entitlement to the entire principal sum of suspense money here in question. This money was not placed in an escrow account, nor was it paid to the suppliers as it accumulated, subject to refund, with interest—a course of action followed by Phillips in other instances . . . instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at seven percent (7%) interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc."

Correctly interpreting the Texas interest statute and in complete harmony with the only state Court decision and prior decisions by the Fifth Circuit Court of Appeals, the Court of Appeals held that Phillips is liable to Respondents for the use of the principal sum of money, at the legal rate of six percent (6%) per annum, computed month by month as the same accrued.

THE PETITION SHOULD BE DENIED

Phillips misinterprets the Texas interest statute and misapprehends the case law thereunder relating to its liability for the *use* of Respondents' money as opposed to *detention* of money.

The state Court decisions relied upon by Phillips and the prior decision of the Fifth Circuit which it claims is in conflict with this case do not involve claims of interest for the *use* of money and are distinguishable both factually and on applied legal principle.

Phillips also makes much of the circumstance that it may be liable to others in similar cases now on file or yet to be filed. (Pet. 7-9). If this is true, then it will follow in such other cases, as in this case, that its liability is based upon the elemental equitable principle that Phillips should not be able to use someone else's money as it pleases, for many years, enjoying considerable benefit therefrom and then pay nothing for the use of the money.

The question of Phillips' liability for interest for the use of the principal fund has been fully ventilated in the Court of Appeals and decided in harmony with the Texas interest statute and the only prior cases, state or federal, involving a claim for interest for the *use* of money.

The petition does not state special and important reasons why this Court in the exercise of sound judicial discretion should grant a writ. U.S. Sup. Ct. Rule 19, 28 U.S.C.A. Therefore, the petition should be denied.

ARGUMENT

The facts of these cases are undisputed; cardinal among them is the fact that for many years Phillips has had the use of Respondents' money and has refused to compensate Respondents for that use upon the theory that any liability for interest for *use* could not arise prior to the time that Federal Power Commission Order 586 became final on October 28, 1972. *Hugoton-Anadarko Area Rate Case,* Opinion 586, 44 FPC 761 (1970).

THE STATUTE INVOLVED

The Texas interest statute defines interest as "the compensation allowed by law for the use or forbearance or detention of money . . ." Tex. Rev. Civ. Stat. Ann. Art. 5069-1.01 (Page 1a of the appendix to the petition).

Article 5069-1.03 provides "When no specific rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable . . ."

The statute, on its face, evidences the legislature's intent to provide for the recovery of interest in three separate instances—for the *use* or forbearance or detention of money. This is apparent from the fact that the three events giving rise to recovery of interest are stated in the disjunctive.

On of the primary and settled rules of statutory construction is that words in common use, when contained in a statute, will be read according to their natural, ordinary, and popular meaning. *Texas & P. R. Co.* v.

Railroad Commission of Texas, 1912, 105 Tex. 386, 150 SW 878, 880. The legislature has sanctioned this rule. Tex. Rev. Civ. Stat. Ann. Art. 10 provides in part: "The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter . . . "; and when the legislature defines a word or groups of words, which it has power to do, the definition, if clear and unambiguous, is binding on the Courts as an expression of the legislative intent. *Federal Crude Oil Co.* v. *Yount-Lee Oil Co., et al,* 1932, 122 Tex. 21, 52 SW2 56, 60.

To give the Texas interest statute the interpretation urged by Phillips (that no interest for the use of money is recoverable until the principal sum is due and payable) would nullify the obvious intent of the legislature and effectively remove from the definition of interest the *compensation for the use of money.* If interest were not recoverable until the principal sum is finally due and payable, but unpaid; then the effect of such a construction is to allow recovery of interest only after the sum payable is detained.

Such a construction would make one-third of the interest statute inoperative and an absurdity. The Court will never adopt a construction that will make the statute absurd or ridiculous, *Hunter* v. *Whitaker & Washington,* 230 SW 1096, 1097, (Tex. Civ. App. San Antonio, 1921, err. ref.) and where the statute is open to two constructions, one of which will effectuate the legislative intent and purpose and make the act operative, whereas the other will defeat that intent and purpose and render it inoperative; the former construction will be adopted. *Imperial Irr. Co.* v. *Jayne,* 1911, 104 Tex. 394, 138 SW 575, 582. Courts ought not to interpret laws so as to nullify or impair them when their language reasonably admits of different meaning. *Spears* v. *City of San Antonio,* 1920, 110 Tex. 618, 223 SW 166, 169.

In granting recovery of interest to Respondents in these cases, the Court of Appeals has followed the clear mandate of the Texas Legislature and correctly interpreted the interest statute which plainly provides for the recovery of interest for the use of money.

THE CASES INVOLVED

(A) The Texas Cases:

Phillips relies on two Texas cases, *Watson Co.* v. *Shaw,* 47 SW2 474 (Tex.Civ.App., Dallas, 1932) reversed on other grounds in *American Surety Co.* v. *Shaw,* 69 SW2 47 (Tex. Comm. App. 1934) and *G&W Marine, Inc.* v. *Morris,* 471 SW2 644 (Tex. Civ. App., Beaumont, 1971, writ refd. n.r.e.) in support of the proposition that Texas Courts have consistently held that interest not be allowed for the period prior to when the debt became due and payable. (Pet. 11) Both cases involve recovery of interest for the *detention* of money as opposed to *use.* It is fundamental in such a case, that since there can be no detention of funds prior to the time they become due and payable, no interst would be allowed until such detention occurred. Neither of the two cases relied on by Phillips is controlling in these cases on the question of interest for the use of money.

In these cases, the Court of Appeals has cited at least one Texas case which stands in direct opposition to the argument of Phillips. *Treon* v. *Richter,* 265 SW2 125 (Tex.Civ.App., San Antonio, 1954, writ refd. n.r.e.) The Plaintiff in the Treon case had made a contract to sell the Defendant a field of corn. The suit was brought

under the Texas Agricultural Protective Act, Tex.Rev. Civ.Stat. Art. 1287-1 *et sic,* which makes it the duty of the dealer to reduce the contract to writing and furnish the seller a copy. The act further provides that the dealer shall have thirty (30) days after delivery within which to pay for the corn. The contract was entered into on May 24, 1950, and harvest was to begin on May 26, 1950. The Court noted that when the contract was made, constructive possession was given to the Defendant and "there is nothing to indicate any payment was to be made until after the harvest was completed. Under such circumstances Treon had thirty (30) days after he had harvested the corn to make payment and the contract does not call for a cash transaction." (Page 126) In this truncated opinion the Court held "the Court also properly allowed interest at the rate of 6% from May 26, 1950, as a matter of law . . ." *Treon* v. *Richter, ibid,* 265 SW2 125 (126). The obvious intent of the Court was to allow the recovery of interest from and after the time the Defendant, Treon, had physical possession and use of the corn or the value thereof; and the Plaintiff's recovery of interest was not limited to the period after the debt became due and payable, which by statute was thirty (30) days after delivery.

In its petition (Pet. 12) Phillips criticizes the Treon case and attacks its value as controlling precedent in these cases for the reason that, by Phillips' interpretation, the case is one involving the recovery of interest *as damages.* Phillips must necessarily employ some literary license to construe the Court's opinion in the Treon case as a suit for interest as damages. This is apparently the result of the circumstance that the cases cited in support of the Court's judgment for in-

terest are *interest as damage cases.* Respondents take a different view of the Treon case. Although the contract between the parties had not been reduced to writing, the Court in effect held that the Agricultural Protective Act had *written* the parties a contract and that the Defendant could not fail to do that which the act required of him (reduce the agreement to writing) and then plead his own neglect or failure as a reason for escaping liability. The opinion in the Treon case does not indicate whether interest was allowed as damages or as compensation for the use of money. The recovery would be appropriate in either case, and it requires no more literary license than Phillips has employed to conclude that the Court allowed recovery of *statutory interest* on the contract which the legislature had written for the parties.

It is difficult for Respondents to understand how Phillips can, in good grace, attack the Treon case as controlling precedent in these cases for no more reason than that it is an *interest as damages* case and at the same time attempt to advance its basic thesis that "the Texas Courts have consistently held that interest not be awarded for the period prior to when the debt became due and payable" (Pet. 11), on the strength of cases which, without exception, involve *interest for the detention of money.* In any event, and whether the Treon case be given the construction contended for by Phillips or not, it still stands, unreversed and as the law in Texas, that a Court in a proper case, contrary to Phillips' contention, may award the recovery of interest prior to the time the debt becomes due and payable.

The distinction which the Texas Courts make between the time interest commences to run in cases involving *detention* of money as opposed to *use* of money

is dramatically illustrated in *City of El Paso* v. *Nicholson,* 361 SW2 415 (Tex.Civ.App., El Paso, 1962, writ refd. n.r.e.) In the Nicholson case, money belonging to the Plaintiff was wrongfully seized by the El Paso Police Department in a gambling raid on January 6, 1958. On January 16, 1958, the money was taken from the police officer by a city alderman and turned over to the city comptroller and deposited by him in the general fund in the Miscellaneous Revenue Account. In holding that the Plaintiff was entitled to recover interest for the use of his money from January 16, 1958, to the date of judgment, the Court of Civil Appeals held that "Up until the money was taken from the police, it was a police action and it had not been determined in any way that the money had been illegally taken; but on January 16, the City of El Paso received this money and put it to use, apparently, as it was put into the General Fund. We think interest, therefore, is proper and allowable, not as a punitive measure, but merely because the city had the use of this sum of money by virtue of the action of the alderman . . ." What the Court is apparently saying is that no interest would accrue for the *detention* of the Plaintiff's money until it had been judicially determined that the taking of the money was illegal, and upon such determination the principal debt would then become *due and payable;* however, the time when the principal debt became *due and payable* was not a concern of the Court once the city took possession of the money, and used it for its general revenue purposes.

Another case relied upon by Phillips is *Allied Building Credits, Inc.* v. *Grogan Builders Supply Co.,* 365 SW2 692, (Tex.Civ.App., Houston, 1963, writ refd. n.r.e.). The facts in this case involved a situation where

Grogan sold notes and security therefor to Allied on a discounted basis and a dealer reserve account was established pursuant to the provisions of their agreement. Upon termination of their overall agreement, Grogan sued for an accounting of the reserve account together with interest, apparently for the detention of Grogan's funds since there is no evidence in the case that there was any use made of the funds by Allied. Prior to the date on which it was determined that Grogan was entitled to payment from the reserve account, Grogan became subject to a Federal tax lien so that Allied, which was served with such lien, could not make payment to Grogan with impunity until the tax lien was released. In this case the Court allowed interest only after the date the tax lien was released. On the basis of the Grogan case, Phillips argues that no interest could accrue to Respondents between October 28, 1973, (the date that FPC Order 586 became final) and the date Phillips paid the principal amount into the registry of the Court, because the ownership of the principal fund was in dispute during that period of time. Again, it is clear that the Grogan case is no authority for the reason that it involves an attempt to recover interest for money wrongfully detained and is not a case involving the question of the parties' right to interest for the use of their money. The Grogan case, in essence, stands for the proposition that there can be no *wrongful detention* while the ownership of the principal sum is in dispute; and since interest for the detention of money is not recoverable until it becomes due and payable, the determination of *due and payable* must await a final resolution of the adverse claim.

(B) The Federal Cases—No Conflict Within the Circuit.

Again, it is difficult for Respondents to comprehend how Phillips will complain in one instance because the Court of Appeals follows a Texas case allowing the recovery of interest before the principal sum became due and payable, Treon case *supra,* (for the reason that it is an *interest as damages case*) and in the same petition find fault with the circumstance that the Court of Appeals did not cite, let alone follow, one of its prior decisions, *City of Texarkana, Texas,* v. *Arkansas Louisiana Gas Company,* 118 F2 289 (5th Cir. 1941) which denied *interest as damages* prior to the time the principal sum became due and payable. If you accept Phillips' interpretation of the Treon case, then it must follow that the Texarkana case is in conflict with it and must yield. We will not unduly lengthen this brief in opposition with a further factual statement of the Texarkana case. The Court of Appeals held that no statute awards interest in that case because the statute "refers to debts liquidated by a writing, and applies only where the amount due can be ascertained from the writing alone . . . the franchise here liquidates nothing. It is the basis of the demand sought to be enforced, but it ascertains no amount as due. Much extraneous evidence is necessary. The statute does not apply." (Page 291). Since the Court had concluded that no statute awards interest and no interest was promised, the sole question involved in the Texarkana case was whether any interest was due *as damages for the detention of money* (City of Texarkana case *supra,* 118 F2 289 (294). The Court of Appeals noted that the Texas Courts recognize the difference between interest contracted or required by statute and interest allowed as damages for the detention of money. The Court then

denied interest on the refunds claimed by the City of Texarkana, Texas, prior to the time that the utility rates were finally established in Texarkana, Arkansas, for the simple reason that under its contract with the utility company an involuntarily lower rate was not to be put into effect in Texas until it was finally established in Arkansas. That date would determine *due and payable* and the date after which interest as damages for money wrongfully detained would be recoverable.

City of Texarkana v. *Arkansas Louisiana Gas Company, ibid.,* is distinguishable on its facts and applied legal principles and was not considered by the Court of Appeals to be controlling in these cases for the reason that it involves the question of interest recoverable *as damages for money wrongfully detained* and does not involve the question of interest for the *use* of money. The case is also factually different in that the contract in the Texarkana case allowed the utility to collect the higher rate, without interest, until the involuntary lower rate was finally established in Arkansas. The Texarkana case should not be considered controlling precedent for the further reason that the Court of Appeals concluded that no statute awards interest because the franchise liquidated nothing. This holding is in conflict with a holding by the Supreme Court of Texas construing the Texas interest statute phrase *ascertaining the sum payable* to refer to the sum a party executing a contract may be reasonably expected to pay, in view of all the circumstances, if at any time he becomes liable to pay; and it is not necessary that the contract establish a fixed liability in a definite amount as of a certain date, if liability can be ascertained with reasonable certainty. *Federal Life Insurance Com-*

pany of Chicago v. *Kriton*, (1923) 112 Tex. 532, 249 SW 193.

For all of the reasons above, the Court of Appeals in these cases correctly disregarded the City of Texarkana case.

(C) The Kishi Case.

In its petition, Phillips has failed to come to grips with the principle and controlling case in these cases. *Kishi* v. *Humble Oil and Refining Company*, 10 F2 356 (5th Cir., 1926). In *Phillips Petroleum Company* v. *Adams*, 513 F2 355, 367, the Court of Appeals has characterized the Kishi case as "a similar, and more venerable precedent". In the belief that a further factual statement concerning the Kishi case would unduly lengthen this brief in opposition, Respondents refer to the factual analysis of the case set forth in the Court of Appeals' opinion in the Adams case at page 367. The Kishi case has not been overruled by any Court, nor has a contrary rule been established by any Texas Court with respect to the right of one in Respondents' position to recover interest for the use of money. It cannot be legitimately argued that any of the cases cited by Phillips, and in particular *City of Texarkana* v. *Arkansas Louisiana Gas Company, supra*, overrules or is in conflict with the Kishi case. In order to demonstrate again that the Kishi case is controlling law in these cases, it is helpful to parallel the facts of the Kishi case with the facts in these cases.

(i) *The Adverse Claims*:

In the Kishi case, Kishi and Lang on the one hand, and Chesson on the other, were rival claimants to the title to a small tract of land and to the royalties on oil

and gas produced therefrom by Gulf and Humble, their respective lessees.

In these cases, and until October 28, 1972, the date FPC Order 586 became final, the adverse claimants to the principal fund were Petitioners on the one hand and Phillips' third party interstate pipeline purchasers on the other.

(*ii*) *The Stakeholders:*

In the Kishi case, the stakeholders were lessees under oil and gas leases executed by rival title claimants.

In these cases, Phillips is the stakeholder as purchaser under natural or casinghead gas purchase agreements.

In both cases, the holder was a stakeholder, having no ownership in the fund and having an obligation to deliver it up upon final determination of ownership between the rival claimants.

(iii) *Nature of the Disputed Funds*:

In the Kishi case, the funds accrued month by month from production and sale of oil and gas.

In these cases, the funds likewise accrued month by month from the production and sale of gas and casinghead gas, and represented the difference between the then area rate and the effective contract rate being received by Phillips in the Panhandle Field of Texas.

(*iv*) *Vehicle Implementing Accrual.*

In the Kishi case, the funds accrued in the hands of the stakeholders, Humble and Gulf, by virtue of express contract. Both lessee and rival claimants entered into an agreement that both lessees were to proceed under their respective leases; and when the Court,

in another suit, determined the title question, an accounting would be had for production accruing in the meantime, with the rival claimant determined to be the owner of the land. Until title was determined in the pending suit, neither of the rival claimants had any right to possession of the funds.

In these cases, Phillips claims to hold funds under authority of case law, *Ashland Oil and Refining Company v. Staats, Inc.*, 271 F. Supp. 571 (D Kan., 1967) (pages 5 and 6 of Appellee's brief in the Court of Appeals). Under that theory, the rival claimants had no right to possession of the funds until the October 28, 1972 affirmance of the FPC's Order 586 allowing the excess rates.

Stated more briefly, in the Kishi case the funds became due and payable to the rival claimant determined to be the owner by judgment in a separate title suit, and in these cases they became due and payable to the rival claimant determined to be the owner by final order of an administrative body.

(*v*) *Use Made of the Funds.*

In the Kishi case, the Court held that the stakeholders had the use of the funds because they kept them.

That is precisely what Phillips did in these cases. It had the use of the funds because it kept them, and at page 28 of Appellee's brief filed in the Court of Appeals, it is admitted that, "the actual cash received was not segregated, but became a part of all the cash in use by Phillips for its corporate purposes. . ."

Since Phillips did not segregate the funds received under its refund obligation filed with the FPC, but used

them for corporate purposes, it is responsible to Respondents for the value of that use, six percent (6%) interest, for the same reason that the stakeholder in the Kishi case was liable.

(*vi*) *Options Available to the Stakeholder.*

In the Kishi case, the Court observed that if the stakeholder had not wished to use the money, and thus be liable for interest, they could have deposited the principal sum in the registry of the Court

That option, among others, was available to Phillips in these cases Phillips could also have placed the money in an interest bearing account (albeit no legal obligation to do so existed), or paid such money to Petitioners under the same type of refund obligation which Phillips had filed with the FPC (a course which the Court of Appeals noted that Phillips had followed in other instances. (Adams case page 366) The option elected by Phillips was to keep the money and use it for its own corporate purposes; and having done so, it became liable for interest on such funds in an amount equal to legal interest, computed month by month as the funds accrued.

(*vii*) *Due and Payable.*

The money held by the stakeholder in the Kishi case became due and payable either to Kishi and Lang on the one hand, or Chesson on the other, month by month as it accrued from royalties under the provisions of the oil and gas lease contracts; however, it did not become due and payable in the sense that either was entitled to possession, until final judgment in the title suit, in accordance with the agreement of all parties. In these cases, the funds became due and pay-

able, in the same sense, to either Respondents on the one hand or to Phillips' third party purchasers on the other, as the same accrued under the applicable gas purchase contracts; but, as in the Kishi case, they did not become due and payable in the sense that either adverse claimant was entitled to possession of them until affirmance of the FPC's rate order on October 28, 1972.

Based upon the foregoing analysis of the authorities, it is clear that the Kishi case is the controlling case law in these cases and not those cited by Phillips, which do not pertain to the obligation of a stakeholder to pay interest when he has elected to follow an option to use the funds for his own purposes at the expense of the party ultimately determined to be entitled to the funds.

The doctrine of stare decisis is peculiarly applicable in matters of statutory construction. When a statute has been construed by a court of final resort, the fact that the legislature lets it stand through one or more subsequent sessions, without amendment, may be regarded as legislative sanction of the construction. The rule will apply even more forcibly where the statute is reenacted or incorporated in a revision without substantial change. *International Traveler's Ass'n.* v. *Bettis,* 120 Tex. 67, 37 SW2 1040, 1043 (1931); and when construed by an appellate court (although not of last resort) legislative acquiescence therein may be presumed from protracted failure to amend the statute. *State* v. *Hatcher,* 52 SW2 794, 799 (Tex. Civ. App., Austin, 1932), reversed on other grounds, 81 SW2 499.

Since the Fifth Circuit decided the Kishi case in 1926, the Texas Legislature has met every other year

during odd numbered years, and the Texas interest statute has been reenacted in several instances in substantially the same form. It was last reenacted by the 60th Legislature, Acts of 1967. The foregoing rules of statutory construction require that the Court conclude that the legislature was cognizant of the construction of the Texas interest statute by the Fifth Circuit Court of Appeals in the Kishi case and acquiesced therein.

(D) Rules of Decision Act:

Phillips asserts that these cases involve the Rules of Decision Act, 28 U.S.C.A. § 1652, and the principles of *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, and, under "Reasons for Granting the Writ" (Pet. 7), argues that the Court of Appeals refused to follow the interpretive criteria used by the Texas courts in determining when interest is to be paid. The Court of Appeals did not so refuse. It gave to each of the Texas cases cited by Phillips an interpretation, as applied to the facts in these cases, which is different from Phillips' interpretation. This Court has made it clear that in the very nature of things it must rely primarily on the Courts of Appeal for interpretations of local laws; and, where questions of local law are raised, and such questions have not been determined by a Court of Appeals, the case will be remanded to the Court of Appeals for such a determination. *Hillsborough* v. *Cromwell,* 326 U.S. 620. This, of course, is because the local federal courts are versed in the local law within their respective jurisdictions and are competent to speak on such local laws. There is no necessity in these cases for a further review by this Court of the Texas cases cited by Phillips and as applied in these cases. That function has already been fully performed by the Court of Appeals.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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